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In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. McELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

VS.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE APPELLANTS

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On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (J.S. App. A-1-A-84) is reported at 577 F.2d 1256 (5th Cir. 1978). The memorandum decision of

the United States District Court for the Northern District of Texas, Dallas Division (J.S. App. A-85-A-125), is reported at 439 F.Supp. 420 (N.D. Tex. 1977).

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the United States District Court for the Northern District of Texas, Dallas Division, was entered on the 10th day of August 1978.

Notices of appeal to this Court were duly filed in the United States Court of Appeals for the Fifth Circuit on the 23d day of October, 1978 (J.S. App. A-126-A-127), and in the United States District Court for the Northern District of Texas, Dallas Division, on the 24th day of October 1978 (J.S. App. A-128-A-129).

The jurisdictional statement of appellants supporting their appeal to this Court was docketed on the 7th day of November 1978, within ninety (90) days from the rendering of the final decision below.

This Court noted probable jurisdiction of the appeal on the 8th day of January 1979.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas.

2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be "in" or "conducting" business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state.

3. Whether the doctrine of *Ex parte Young*, which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas.

4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a "violation" of said Act for purposes of federal court jurisdiction thereunder when no specific proscription of thereof has been breached.

5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdictional portion of the Exchange Act a "violation" occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho by an Idaho official in enforcing the Idaho law.

6. Whether Congress has reserved to the States, under Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), the power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

7. Whether, independently of Section 28(a), the States have the inherent power to regulate corporate takeover offers in a manner which differs from that adopted in the Williams Act amendments to the Securities Exchange Act of 1934.

8. Whether a federal court may weigh the benefits of a state corporate takeover law against its alleged effect upon interstate commerce.

9. Whether, independently of Section 28(a), state corporate takeover laws constitute an undue burden on interstate commerce.

10. Whether a tender offeror has standing to maintain an action under the Williams Act amendments to the Securities Exchange Act of 1934 to challenge the constitutionality of state corporate takeover laws.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 8, Clause 3, United States Constitution:

> The Congress shall have Power . . .
>
> To regulate Commerce . . ., among the several States, . . . ;

Article 6, Clause 2, United States Constitution:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . ., shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

Eleventh Amendment, United States Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign state.

Securities Exchange Act of 1934, §§ 13(d, e), 14(d-f), 15 U.S.C. §§ 78 m(d, e), 78n(d-f) (1970):

> Because of length of text, reproduced at pp. A-1 to A-9 of Appendix hereto.

Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1970):

> The district courts of the United States, . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity or actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and

process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . .

Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (1970):

. . . Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

28 U.S.C. § 1391(b) (1970):

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law.

Idaho Code §§ 30-1501 to 30-1513 (Supp. 1978):

Because of length of text, reproduced at pp. A-10 to A-26 of Appendix hereto.

Texas Revised Civil Statutes Annotated article 2031b, § 3 (Vernon):

Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law respecting designation or maintenance or resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as an agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or to be made a party.

Texas Revised Civil Statutes Annotated article 2031b, § 4 (Vernon):

For purposes of this Act, and without including other acts that may constitute doing business, any foreign corporation, joint stock company, association, partnership, or non-resident natural person shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or by the committing of any tort in whole or in part in this State.

• • •

STATEMENT

Appellee Great Western United Corporation (hereinafter GWU), a Delaware corporation with executive offices in Dallas, Texas, the controlling interest of which is owned by N. B. Hunt and W. H. Hunt, is traded on the N.Y.S.E. On March 21, 1977, GWU announced its intention to make a tender offer to purchase up to two million shares of stock of the Sunshine Mining Co., a Washington corporation whose stock is traded on the New York and Spokane exchanges. Sunshine Mining Co. has its principal asset, a silver mining operation, in the State of Idaho, with other substantial assets located in the States of New York and

Maryland. The tender offer for shares of Sunshine stock brought into play the federal law disclosure requirements of the Williams Act amendments to the Securities Exchange Act of 1934 as well as, potentially, the disclosure and review requirements of corporate takeover laws of the three states.[1]

Simultaneously, on March 21, 1977, GWU representatives personally appeared at and filed a 13D disclosure statement with the United States Securities and Exchange Commission (hereinafter SEC),[2] personally appeared in Idaho and filed an information statement under the Idaho Corporate Take-Over Law, and approached the proper authorities of the States of New York and Maryland to inquire about the possibility of jurisdiction being asserted under those States' corporate takeover laws. Pursuant to request by a GWU representative that he be informed in

[1]Sunshine's wholly owned subsidiary, Anchor Post Products, Inc., has manufacturing facilities based in Maryland and Sunshine conducts substantial business in New York. Thus the corporate takeover statutes of those two states were arguably applicable to GWU's tender offer as well as Idaho's statute.

[2]The tender offer proposed by GWU was subject to the terms and conditions set forth in a proposed form of an Offer to Purchase and related Letter of Transmittal filed by GWU with the SEC pursuant to Sections 13(d, e) [15 U.S.C. §§ 78m(d, e) (1970)], the Williams Act amendments to the Securities Exchange Act of 1934. The 13D disclosure was required by the same statutes.

In a related case, *Sunshine Mining Co. v. Great Western United Corp.*, (1977-78 Transfer Binder) CCH FED. SEC. L. REP. § 96,049, filed in the United States District Court for the District of Idaho, the court denied Sunshine its requested injunctive relief and specifically found that there were no material omissions in GWU's filings with the SEC. That litigation was dismissed as a result of settlement between the parties on October 5, 1977.

Texas by telecopy[3] of Idaho's response to the GWU filing, on Friday, March 25, 1977, Idaho's Deputy Administrator for Securities of the Department of Finance transmitted to Texas a comment letter requesting disclosure of additional information by GWU (A. 77 to A. 85) and an administrative order issued by Appellant McEldowney delaying the effective date of the GWU tender offer (A. 86 to A.87). At this time GWU was uncertain whether or not Maryland and New York intended to assert jurisdiction.

GWU's sole response to the Idaho letter and order was, on Monday, March 28, 1977, to file an action in the United States District Court for the Northern District of Texas, Dallas Division, against the attorneys general and officials in charge of securities regulation of the States of Idaho, New York, and Maryland. The Complaint alleged, in substance, that GWU was aggrieved by the acts and threatened acts of the Appellants and other Defendants directed toward GWU and that such acts were unconstitutional (A. 1 to A. 18). GWU sought an injunction against the state officials enjoining them from enforcing their state corporate takeover laws and a declaratory judgment that those laws, insofar as they purport to apply to an interstate cash tender offer for the purchase of securities traded on a national securities market (a) represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, (b) intruded without warrant into an area preempted by federal regulation in contravention of the Supremacy Clause

[3]Stephen Craig Metzger, an attorney for GWU, suggested to Melvin Baptie, Deputy Administrator—Securities of the Idaho Department of Finance, that he send the Idaho response to Dallas by telecopier. (Trial Tr. p. 441, lines 1-21) (A. 292).

of the United States Constitution, and (c) denied to GWU rights of equal protection of the law and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1872.

GWU applied to the court for an *ex parte* temporary restaining order against the state officials to prohibit continued enforcement of their challenged state laws. After counsel for the Idaho officials called the court, the matter was continued until 9:00 A.M., Wednesday, March 30, 1977, for a hearing on GWU's motion for a restraining order. At that time counsel for the Idaho official Appellants and the Maryland officials appeared specially and formally moved to dismiss the action for lack of jurisdiction and improper venue. After hearing argument for the Idaho and Maryland officials, accepting exhibits, and having received a brief in behalf of the Idaho officials on the jurisdiction and venue issues, the court granted the temporary restraining order and consolidated a hearing for preliminary injunction and trial on the merits for Friday, April 8, 1977. The court refused Idaho counsel's request for a stay of its order pending an emergency appeal to the United States Court of Appeals for the Fifth Circuit. Idaho counsel, joined by New York and Maryland counsel, thereupon immediately filed a request for emergency appeal to the said circuit court, which was granted, with oral argument thereon scheduled for Tuesday, April 5, 1977. Following a spirited argument by counsel and questioning by each of the three panel members, the circuit court, on April 6, 1977, stayed the order of the district court pending further proceedings therein, ordered the court to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits, and suggested that because the "proceeding involves novel and difficult issues which have broad impact upon federalism" that, should the district court determine that jurisdiction and venue were proper, it should consider interlocutory certification of such determination to the circuit court under 28 U.S.C. § 1292(b) (1970) before trial on the merits (A. 34 to A. 35).

The hearing so ordered was held by the district court in Dallas on April 8, 1977, and on April 21, 1977, the court filed its findings of fact, conclusions of law, and order, which held that no case or controversy existed between GWU and the Maryland officials, but that jurisdiction and venue were proper in the Northern District of Texas over the Idaho and New York officials against whom a case or controversy was deemed to exist. The court declined to make interlocutory certification of the jurisdiction and venue issues to the Fifth Circuit. Mandamus and prohibition petitions as well as petitions for leave to appeal under 28 U.S.C. §§ 1291 and 1292(b) (1970) were presented to the Fifth Circuit which, on May 16, 1977, denied the requested relief.

On May 23 and 24, 1977, the merits of the case were tried to the court with several expert witnesses presenting testimony for each side to the controversy. At the opening of the trial, New York officials advised the court and GWU that that State had decided not to assert jurisdiction over the proposed tender offer. Although attorneys for the New York official defendant participated in the trial, the court ultimately determined that GWU's case against New York was moot and dismissed as to that State official.

On September 2, 1977, the district court issued a memorandum decision in which it considered the issue of standing as well as reiterated its jurisdiction and venue determinations and entered judgment on the merits declaring unconstitutional and enjoining enforcement of the Idaho Corporate Take-Over Law insofar as it purported to apply to GWU's proposed cash tender offer for purchase of securities of Sunshine Mining Co. Specifically, the court held that as applied to the instant case the Idaho Corporate Take-Over Law represented an unconstitutional burden on interstate commerce and intruded without justification into an area preempted by federal securities laws, namely the Williams Act. Judgment was stayed by the district court through September 16, 1977, to enable Appellants to file an application for stay of judgment with the United States Court of Appeals for the Fifth Circuit and to enable that court to consider whether to grant a further stay of judgment pending a ruling of Appellants' application. On September 8, 1977, Appellant McEldowney filed his appeal of the district court decision with the Fifth Circuit, and on September 16, 1977, that court entered its order denying a stay of the trial court's judgment. Oral argument on the appeal was heard on December 13, 1977, and on August 10, 1978, the appellate court decision affirming the district court below (with Judges Wisdom and Clark in the majority, over the dissent of Judge Godbold) was filed. Specifically, the Fifth Circuit held that (a) the district court had subject matter jurisdiction over the controversy, (b) the district court had personal jurisdiction over the defendants by application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), (c) the Texas long arm

statute[4] constitutionally authorized assertion of personal jurisdiction over the nonresident state official defendants, (d) section 27 of the Securities Exchange Act of 1934[5] provided an independent source of personal jurisdiction over the defendant Idaho officials, (e) venue in the Northern District of Texas was proper both under § 27 of the Securities Exchange Act of 1934 and the general venue provisions of 28 U.S.C. § 1391(b), (f) the Idaho Corporate Take-Over Law was preempted by federal securities law under the Williams Act,[6] and (g) the Idaho Corporate Take-Over Law was invalid under the Commerce Clause.

Timely appeal to this Court was next pursued by Appellants Kidwell and McEldowney, as above noted.

BACKGROUND OF THE CORPORATE TENDER OFFER

Though a section of the Idaho law in question herein does attempt to define for jurisdictional purposes what a "take-over offer" is[7] such a definition was avoided in federal law.[8] In general terms, a "tender offer" may be

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[4] TEX. REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon).

[5] 15 U.S.C. § 78aa (1970).

[6] 15 U.S.C. §§ 78m(d,e) and 78n(d-f) (1970); Sections 13(d, e) and 14(d-e) of the Securities Exchange Act of 1934.

[7] IDAHO CODE § 30-1501(5) (Supp. 1978).

[8] The Congress and the SEC continue to decline to define the term "tender offer" for Williams Act purposes, the SEC recently noting:

> In recognition of the dynamic nature of tender offers and the need for the Williams Act to be interpreted flexibly in a manner consistent with its purposes, the Commission affirms its position that a definition of the term "tender offer" is neither appropriate nor necessary at this time. The Commission wishes to emphasize that in its view the term should be understood in

regarded as any method of corporate takeover "sought to be achieved by a large-scale stock purchase program."[9] Both federal law[10] and most state laws, including the Idaho law at issue herein,[11] come into play whenever anyone acquires directly or indirectly the beneficial ownership of more than five percent (5%) of the outstanding shares of a "target company."[12] Historically, cash tender offers for purchase of corporate shares have proceeded before announcement with secrecy, and after announcement with speed.[13] Also typically, as in this instant case, the tender

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a context which furthers the purposes of the Williams Act. Thus, this position should in no way be construed to mean that the term applies only to a so-called "conventional" tender offer.

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In the Commission's view, the term "tender offer" is to be interpreted flexibly in accordance with the intended purposes of Sections 14(d) and 14(e) of the Williams Act. Therefore, the determination of whether a transaction or series of transactions constitutes a tender offer depends upon consideration of the particular facts and circumstances in light of such purposes.

Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240) at 25-26.

[9]Lipton, *Open Market Purchases*, 32 Bus. Law 1321 (1977).

[10]Section 13(d)(1) of the Securities Exchange Act of 1934; 15 U.S.C. § 78m(d)(1) (1970).

[11]Idaho Code § 30-1502(1) (Supp. 1978).

[12]The term "target company" is commonly used in the lexicon of corporate takeovers to denominate the company toward which a tender offer is directed, and is defined in Idaho law, at Idaho Code § 30-1501(6) (Supp. 1978). *See* E. Aranow & H. Einhorn, Tender Offers for Corporate Control, Ch. 1 (1973).

[13]Alone, the Williams Act, continues to encourage the "Blitzkrieg" or "Saturday night special" tender offer "and does little, if anything, to restrain the use of panic as a tactic" in encouraging investors promptly to tender their shares. Robinson, *Directors Under Attack in New 'Bear Hug' Mergers*, N.Y.L.J., June 12, 1978, at 41, col. 1. *See also* Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 Fordham L.Rev. 1, 9 (1976).

offeror (sometimes euphemistically denoted the "raiding company"), shortly prior to public announcement of an "unfriendly" market tender offer at a lower price per share tendered, will quietly approach incumbent management with its "friendly" tender offer which it encourages management to consider favorably and recommend to the target company shareholders.[14] This action is known as the "bear hug"[15] and places target company management in the awkward position of considering in haste an offer to its company's shareholders for purchase of all or a portion of outstanding shares at a price more favorable than will subsequently be offered by public announcement. Management's fiduciary duty to shareholders places them squarely on the horns of a dilemma. Approval of the bear hug offer after hasty consideration could result in potential personal liability if subsequent events determined that factors which should have been considered were not, while disapproval could result in subsequent litigation by shareholders who were dissatisfied with the lower publicly

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[14]As the district court herein noted, the target company (Sunshine) board of directors, on Monday, March 21, 1977, refused to recommend to shareholders GWU's "friendly" offer of $16.75 per tendered share. (J.S. App. A-87, n. 3.) In fact the "friendly" offer was presented to management on Sunday night, March 20, 1977 (after a series of meetings between GWU and Sunshine officials that Friday and Saturday), with those officials given only until Monday morning to announce their decision to accept or reject the "friendly" offer. (Transcript of TRO hearing, March 30, 1977, remarks of Mr. Juceam at pp. 87-88.)

[15]*The Great Takeover Binge*, Business Week, Nov. 14, 1977, at 182, col. 3. *See also* Robinson, *Directors Under Attack in New 'Bear Hug' Mergers*, N.Y.L.J., June 12, 1978, at 25; Flom, *Forcing a Friendly Offer*, Bus. Law, 1319 (1977).

announced price.[16] Once the tender offeror decides to go ahead with public announcement of its tender offer, there is nothing in the federal law to prevent presentation of the offer to shareholders within a truncated time period during which shares must be tendered or the opportunity to tender lost (known as the "Blitzkrieg" or "Saturday night special") and has been said to encourage panic selling.[17] Quite to the contrary, state corporate takeover laws, such as Idaho's,[18] traditionally have a built-in delay period in order to allow shareholders a longer period of time within which to make a considered decision, based upon information required to be filed under the federal Williams Act as supplemented by any additional information required under the state corporate takeover law, before deciding whether or not to tender some or all of their shares of stock in the target company.[19] State corporate takeover laws are criticized as being "tools" whereby entrenched target company management can act to defeat a tender offeror's bid. The fallacy in such a contention is threefold:

[16]In fact, in this instant situation, Great Western United Corp. (a Sunshine Mining Co. shareholder) instituted a stockholder derivative action attacking the agreement between Sunshine and its investment banker on the premise that the agreement was "defensive," with a primary purpose to block the offer by GWU. Great Western United Corp. v. Sunshine Mining Co., 77 Civ. 4500 (S.D. N.Y., filed Sept. 12, 1977). *Discussed in* M. LIPTON & STEINBERGER, TAKEOVERS AND FREEZEOUTS 405 (1978).

[17]*See* note 13 *supra*. *See also* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L. J. 510, 510 n. 6 (1979).

[18]IDAHO CODE § 30-1503(3) & (4) (Supp. 1978).

[19]As will be developed below this additional time period provided by state law not only inures to the benefit of shareholders, but also has the collateral effect of allowing incumbent target company management time within which to muster defenses to the takeover bid, or to seek a "white knight" new bidder who will offer a higher price to the shareholders.

(i) state laws do not keep management in but, instead, allow entry into the takeover bidding process of other offerors who may raise the price investors receive for their shares yet would act just as quickly to oust inept incumbent management as would the original bidder; *(ii)* any successful bidder would be foolish to oust highly efficient, well respected incumbent management who, if allowed to continue, will more likely enhance the value of the offeror's acquisition than new, untried management; and *(iii)* if the target company is interesting at all, once the takeover bidding process is initiated *someone* will in all likelihood take over control of the target company.

Though writings about the state corporate takover laws' relationship with the federal Williams Act requirements are replete with pro and con discussions about preemption and burden on commerce (or the lack thereof), the fact remains that "almost all the companies that have been the targets of takeover bids have eventually been gobbled up, although not always by the original bidder."[20] One of the most prominent and active attorneys in the tender offer field has commented: "No major tender offer has gone through a state hearing with the original offeror getting the target at the original price. * * * In most cases, the target arranged a deal with a white knight at a higher price."[21] In such cases, where the original tendor offeror is unsuccessful due to a higher bidder, "the losing bidder

[20]*The Great Takeover Binge*, BUSINESS WEEK, Nov. 14, 1977, at 177, col. 2.

[21]Fitzhugh, *Tender Offer Issue Set for Court Showdown*, N.Y.L.J., May 18, 1977, at 6, col. 4 (quoting remarks of Martin Lipton, Esq., of the New York bar).

who has gradually acquired some of the target company's stock comes out with a capital gain."[22]

SUMMARY OF ARGUMENT

I. It is well to remember that the landmark *Ex parte Young*, 209 U.S. 123 (1908), decision created a fiction for overcoming Eleventh Amendment proscriptions against suing a state directly. Following the thrust of the *Young* action itself, brought in a federal court in Michigan at the residence of the Attorney General of Michigan to challenge allegedly unconstitutional action he had taken under Michigan law as an official in a governmental capacity, there is *not one* reported case in which a state official has been deemed amenable to suit outside the jurisdiction in which he officiates. In fact, the only two reported cases on the issue hold that the challenged official must exclusively be sued at his official residence. Thus, the *Young* fiction has the limited ability to strip locally the cloak of sovereign immunity from a challenged official, but does not force him to stand naked before courts anywhere in the Nation.

II-A. In this instant case, two Idaho state officials were held amenable to personal jurisdiction by a federal district court in Texas by applying that State's long arm statute and its "doing business" concepts. Appellee GWU successfully argued below that the Idaho official Appellants were deemed to be "doing business" in Texas in that term's necessary commercial context merely because they, in Idaho, applied the terms of Idaho law to a corporation whose principal offices were in Texas—and the effect of the application of Idaho law was deemed to have repercussions ("effects" or "consequences") in Texas (as well as other states), thus making the Idaho officials amenable to suit in Texas courts. Despite the fact that these officials were behaving in Idaho in a purely governmental capacity—as opposed to a private or proprietary capacity—they were deemed in "business" under the Texas long arm statute. This jurisdictional conclusion was reached notwithstanding that Appellant Idaho Attorney General Kidwell (now Leroy) took no action whatsoever in Idaho or elsewhere. His only involvement is that of being an Idaho official charged with general duty to enforce Idaho law, and specific duty to enforce the challenged law if called upon to do so by the Director of the Idaho Department of Finance (Appellant McEldowney). Appellant Kidwell undertook no independent action, nor was he called upon by Appellant McEldowney to take action—he was merely anticipatorily sued by Appellee Great Western United Corp., and that remains to this date his singular connection with this litigation. Moving to the next level of personal jurisdiction inquiry under the Texas long arm statute, the courts below ruled that due process and fundamental fairness inquiries were satisfied on the basis that the Appellants somehow *might have* availed themselves of the benefits of Texas law. How this was to be accomplished—Idaho officials somehow coming to Texas without benefit of an Idaho court judgment susceptible to full faith and credit treatment and expecting to have the support of Texas law to enforce Idaho law in Texas—was never developed. More-

[22] *Id.* (author's comment). It has been noted that: "Many offerors will decide to accumulate a 4.9 percent interest in the target in order, if they are topped by another bidder when the target seeks a defensive merger, that they, the original bidder, come away with a profit." Lipton, *Open Market Purchases*, 32 Bus. Law. 1321 (1977).

over, the continuing reliance on such cases as *International Shoe, Hanson v. Denckla,* and *Shaffer v. Heitner*—all of which arose in a commercial, profit-oriented context—to sustain constitutional propriety of asserting long arm jurisdiction over Idaho officials acting solely in Idaho, solely in a governmental capacity, appears wholly unfounded. To analogize, while it would seem quite equitable for a mail order company based in Texas to be deemed amenable to suit in Idaho courts as a result of either defective merchandise or other consequences of commercial activity which was acted upon by an Idaho resident, it would be inequitable for the Texas company to sue the Idahoan in Texas courts for a default in payment. On the one hand, the Texas-based company is asked by the courts to pay a "price" for the privilege of conducting commercial ("business"), profit-seeking (though not necessarily profit-making) activities nationwide (or at least in Idaho), yet the fortuity of the Idahoan acting on the solicitation by the Texan is not grounded in the same commercial soil. The "fairness" of the Texan's defending an action in Idaho is merely a result of an initial election to enter into commercial activity. To utilize this same commercial rationale toward Idaho officials is clearly improper under federalism concepts and an affront to due process and fundamental fairness standards announced by this Court, particularly as recently discussed in *Kulko v. Superior Court,* 436 U.S. 84 (1978). That the assertion of Texas long arm jurisdiction over the Idaho officials by the courts below was clearly wrong is made more evident by the fact that Appellee GWU voluntarily came to Idaho and there made a voluntary

filing under the challenged Idaho law before retreating to Texas to file this action.

II-B. An action against the Idaho official Appellants will lie under section 27 of the Securities Exchange Act of 1934 only if subject matter jurisdiction, personal jurisdiction, as well as venue are found thereunder.

1. Subject matter jurisdiction was asserted over this action on the grounds that the non-resident Idaho officials acting to enforce or being charged with the enforcement of an Idaho law alleged to be in "conflict" with federal law for purposes of section 28(a) of the Securities Exchange Act of 1934, somehow "violated" the 1934 Act notwithstanding the fact that no specific proscription of that Act was breached. Simply stated, though unlike other portions of the 1934 Act under which "violations" have been found to occur—all of which contain mandatory language—the courts below adopted a standard that alleged "conflict" equals "violation" for jurisdictional purposes. Interestingly, in interpreting application of the section 28(a) "conflict" term, the SEC has deemed that word to apply only to impossibility of compliance with both state and federal law, rather than mere inconvenience or overlap, as alleged here. Nowhere has it ever before been asserted or held that state officials, themselves regulators, were susceptible in their regulatory capacity to being treated just as are traders who wrongfully or fraudulently act in the commercial securities field. Furthermore, it is clear that the Idaho Corporate Take-Over law merely fleshes out and adds substance to the skeletal requirements of disclosure and regulation in cash tender offers under the federal Williams Act. Though the Idaho law requires more effort to comply with than does the fed-

eral Williams Act there is no demonstrated impossibility of compliance with both. Inconvenience or delay occasioned by compliance with Idaho law in addition to federal law inures to the detriment solely of an initial takeover bidder who hopes that merely by complying with federal law it will be able to pull off a short-fused tender offer and accomplish its desired takeover bid before the market, the target company, or potential competitive takeover bidders have a chance to respond. The raiding company seeks the "Blitzkreig" or "Saturday night special" rapid tender offer to achieve its takeover goals quickly and cheaply; the shareholders of the target company deserve the additional disclosure and delay brought into the cash tender offer process by state law so that they may make informed, deliberate choices and benefit by any higher market prices occasioned by the appearance of competing offerors who bid up the prices to be offered shareholders. Thus, the Idaho law does not conflict with nor make impossible performance under federal law, and Idaho officials do not "violate" federal law by enforcing Idaho takeover law.

2. Personal jurisdiction under section 27 of the 1934 Securities Exchange Act is lacking thereunder on constitutional grounds as it is under the Texas long arm statute. In finding Texas jurisdiction under section 27, the courts below did not rely on any contacts of the Appellants peculiar to Texas, but, instead, employed a standard which based personal jurisdiction on the fact that acts, real or threatened, by the Idaho officials had practical extraterritorial "effects" or "consequences" which were felt in that State. For the same reasons discussed above regarding the

Texas long arm statute, personal jurisdiction lacks constitutional foundation.

III. Applying the venue portion of section 27 of the Securities Exchange Act of 1934 as well as the applicable general venue statute to the facts of this case, it is readily apparent that all actions *by any Appellant* occurred in Idaho as a direct consequence of the action of Appellee in voluntarily coming to Idaho and submitting to Idaho Corporate Take-Over Law jurisdiction. Though the courts below found certain justification for Texas venue in the fact that a comment letter requesting additional information and an order delaying the effective date of GWU's tender offer were sent from Idaho to Texas by means of an instrumentality of interstate commerce, that mode of transmission was requested by a GWU official. More fundamentally, however, the situs of venue should not turn on such a flimsy basis (which would, arguably, be defeated had Idaho informed GWU personnel that the only way it could learn of Idaho action on its takeover filing was to come to Idaho to receive it). What seems to have been overlooked is the fact that venue is a defendant's right, yet the weighing of "significant contacts" with Texas as a basis for venue was accomplished by adding up matters of impact to the plaintiffs. As state officials, though stripped of a sovereign immunity cloak for subject matter jurisdiction, the Appellants remain entitled to assert the place of their official residence, Boise, Idaho, as the only proper place of venue for this action. However the circumstances of this case are categorized—as the place in which the defendants "transact business" for section 27 purposes, or where the "claim arose"—there is only one state, Idaho, where venue is proper. As already

noted, these Defendants/Appellants do not "transact business" anywhere; they are government official regulators, not businessmen. The categorization of their regulatory activities as their "business" perverts that word to a context never intended in jurisdiction and venue issues. That the claim arose in Idaho is evident from the fact that everything that led up to the complained-of action took place in Idaho, as did the action itself which precipitated this lawsuit. There can only be one place in which venue is proper; that place is the District of Idaho.

IV. Case law makes it clear that state statutes are entitled to a presumption of constitutional validity and that federal preemption, though it need not be express, must be obviously implied in order for a state law to be swept aside. Conflict analysis in the preemption field demonstrates that for a conflict between state and federal law to create a preemption of state law there must be a practical impossibility of compliance with federal law as a result of the state incursion into the regulated field. In the context of what the Williams Act provides regarding corporate takeovers, it is clear that the federal law introduces only the barest of requirements of reporting and disclosure, rather than a pervasive, inclusive federal regulatory pattern. In this arena, state laws like Idaho's supplement federal investor protection by requiring tender offerors to make additional disclosures for the benefit of target company shareholders and provide a delay factor so that shareholders may make an informed decision whether or not to tender. No impossibility of performance with the two laws is created, and the additional burden of Idaho law requirements is clearly warranted by its additional protections

which almost invariably inure to the benefit of shareholders as a result of delay and additional disclosure—usually resulting in a higher offering price either by the original offeror or a successor as an auction market for target company shares develops. State laws reduce the chance for a tender offeror to invade the market with a hasty Saturday night special, Blitzkrieg offer which is effected in eight to ten days (or less). As this Court has pointed out, the courts should not presume a congressional intent to occupy a field where such an intention is not *clearly* manifested. Since SEC officials and congressmen as well as others knowledgeable in the field of tender offers suggest that Congress *should* act to preempt state takeover laws, the implication is clear that Congress has to date refused so to act. Until Congress does act affirmatively to preempt, or takes action to flesh out the Williams Act from its present skeletal form, state laws serve a valuable function and provide a national laboratory from which Congress may observe and benefit in its future dealings in the securities field. The continued existence of Securities Exchange Act of 1934 section 28 authorization for non-conflicting state laws in the securities field also contributes to the idea of a state right to legislate local regulation of tender offers. Congress must be presumed to have known when it engrafted the Williams Act onto the Securities Exchange Act of 1934 that the well-recognized section 28 would affect it.

Any delicate balance between tender offeror and target company suggested as a collateral "purpose" in 1968 passage of the Williams Act—already discounted by this Court's decision in *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977), that the Act's sole purpose was investor pro-

tection—must be discounted at the present time inasmuch as 1970 amendments to the Act itself have upset this "balance," as have the 1976 Hart-Scott-Rodino Antitrust Improvements and as will the most recently proposed new SEC rules with their longer delay period. The evidence against federal preemption is overwhelming.

V-A. In assessing a state law's burden on interstate commerce in an area where state and federal law traditionally coexist, a court should not indulge in weighing benefits of that law against its alleged effect on commerce. State takeover laws operate in the field of securities law, which has a long history of concurrent state-federal regulation. Legislative judgment of what is or is not beneficial should remain outside the judicial province if separation of powers is to remain a viable concept.

V-B. A three-step analysis, provided by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), should be employed in determining whether a state law unduly burdens interstate commerce.

1. In determining, initially, whether a state law promotes a legitimate state interest, actual effects, rather than speculation, should be assessed. That the challenged Idaho works a detriment to the initial tender offeror is recognized. Yet, this "detriment" to the offeror (who nowhere has a federally-protected "right" to engage in a tender offer) results in substantial benefits to the prime beneficiaries of the state laws—the target company shareholders. Even a witness of Appellee concedes that delay occasioned in tender offers—such as generated by state laws—has almost always resulted in shareholders being offered more for their

shares than they would have received if the offer had gone through quickly. Additional information provided to shareholders through state laws assists in formulating the critical investor decision of how many, if any, shares to tender, and gives the shareholder some indication of what the offeror plans for the company if the takeover is successful. The tender offer does not merely involve a simple, mass securities transaction. In all likelihood many of the tendering shareholders (through pro pro rata application in a partial tender offer or as a result of not tendering all shares owned) will remain investors in the reconstituted target company, and have a true need to know what is planned for its future—knowledge furnished by the more broad scope information brought out by state law. The tender offer which goes forward under the type of deliberative and informative process occasioned by the additional requirements of state takeover laws more closely resembles other means of transfer of corporate control—merger, sale of assets, stock tender offers, proxy battles, and the like—in which delay and broad information dissemination are required by state and federal law. Without the additional protection to investors afforded by state law such as the Idaho Corporate Take-Over Law the cash tender offer is primarily a device whereby an offeror, acting in great haste after a surprise announcement, can in a very brief period of time obtain control of a target company at a bargain price. While such a procedure certainly benefits the tender offeror, it may well work to the detriment of the shareholders of the target company who remain ill informed, required to make a hasty decision, and denied the benefit of an open, auction market for their shares. Though it is certainly true

that incumbent management of a target company may choose to attempt to forestall or defeat a particular tender offer by resort to procedures available to it under a state takeover law, resort to such devices may be a breach of fiduciary duty are but one means of counter-action on a variety of planes already available for use in challenging the take-over bid. At any rate, the Idaho Corporate Take-Over Law provides protection for shareholders as a primary goal, not devices for use to defeat tender offers. That a "friendly" tender offer which is approved by target company management is exempt from the Idaho law's purview is simply the expression of a belief by Idaho that the existing fiduciary responsibilities to shareholders already imposed by state law are sufficient to insure proper action by target management, and there is no need under such circumstances for an overlay of additional state regulation. The Idaho law is but a logical extension of the minimal requirements of federal law under the Williams Act.

2. The extraterritorial reach of the Idaho Corporate Take-Over Law remains its most highly criticized attribute, in that the law affects shareholders of the target wherever they live so long as the target company meets the criteria for inclusion under the aegis of the Idaho law. Target companies which are incorporated in Idaho or which have their principal offices together with substantial assets in Idaho are governed by Idaho law. Asserting jurisdiction over activities relating to the target incorporated in Idaho is simply a logical extension of traditional internal affairs regulation of corporate activities by state law. Application of the same regulation to corporations, pseudo-foreign in nature, whose principal activities occur in Idaho is also an

accepted internal affairs type of regulation. That such regulation cannot be effected by Idaho if limited to shareholders living in Idaho is obvious, for loss of the extraterritorial reach of the Idaho Corporate Take-Over Law would simply mean that takeover bidders for a company subject to the Idaho law would simply avoid the Idaho law by refusing to make their tender offer to Idaho shareholders. The state law design as a means of shareholder protection would then, in fact, work to the detriment of Idaho shareholders who would be excluded from the tender offer. Because target management itself, through its high fiduciary responsibility to shareholders, is in essence an "embodiment" of all shareholders and must act in their best interests in any takeover bid there is additional rationale for Idaho asserting the protection of its Corporate Take-Over Law over tender offers directed toward corporations in Idaho subject to the Idaho law regardless of where in this Nation the target shareholders live. Application of this type of internal affairs regulation by state law already pervades all other means of change in corporate control, and is well accepted. Even Congress noted the similarities between a tender offer and proxy contest and was motivated by the relationship in passing the Williams Act.

3. The final prong of the *Pike* analysis involves assessment of the burden of state law on interstate commerce to determine whether or not it is excessive. Unlike commerce clause situations in which state laws have been struck down because of a need for uniformity of law in a particular field, the field of securities regulation has since its very beginnings existed with dual state and federal

regulation—and there appears to be no congressional interest in upsetting that balance by federalizing that portion of corporate law relating to securities. Though the courts below opined that operation of the Idaho Corporate Take-Over Law "stopped" 31 million dollars of interstate commerce, it should be pointed out that this "stoppage" was as a result of GWU's absolute failure and unwillingness even to attempt to comply with Idaho law, after initially submitting voluntarily to Idaho jurisdiction, rather than as a result of any undue delay occasioned by operation of the Idaho law during compliance by GWU. Thus, the challenge is made on the basis of effects occasioned by noncompliance with Idaho law, rather than by compliance therewith. Such analysis is inappropriate in assessing "burden" of actual effect of Idaho law on interstate commerce, and would assuredly lead to the downfall of most state laws. The effect of compliance is what should be assessed, and Idaho submits that the effect of compliance is merely a slight additional expense occasioned by additional disclosure requirements and possible hearings—plus the possible loss of an opportunity quickly to acquire control of the target at a bargain. This effect is more than offset by the attendant benefits which target company shareholders reap from the additional information brought out by Idaho law and the ability of delay to bring competitive market factors to bear on the tender offer process. The "burden" on interstate commerce is slight—and appropriate.

V. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977), left open the question whether a tender offeror suing for injunctive relief under the Williams Act had standing to

sue. In this instant case, the facts are further complicated by GWU's status, not as a tender offeror, but merely as a *potential* tender offeror, thus in a posture similar to the potential purchasers or sellers of securities who were denied standing by this Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Since the Williams Act is designed for shareholder protection, standing thereunder should be limited to those beneficiaries, and, although GWU is a Sunshine Mining Co. (the target) shareholder, it is not in that capacity that this action was brought.

VI. Appellant Idaho Attorney General Kidwell (now Leroy), as Appellee points out, did not appeal to the circuit court from the district court's decision. Yet, the circuit court, after initially noting this fact, proceeded to analyze this case and make its disposition as though both Idaho official defendants were before it, and the affirmance by that court of the district court decision clearly again affected Appellant Kidwell's rights. Accordingly, Notice of Appeal in behalf of both Idaho defendants was filed below with both the district and circuit courts in order to assure that the rights of Appellant Kidwell which continue to be affected will finally be resolved by this Court, as they should be.

ARGUMENT

I

THE FICTION OF EX PARTE YOUNG SHOULD NOT BE EXPANDED BEYOND THE LIMITED JURISDICTION IT ALLOWS OVER STATE OFFICIALS BY CIRCUMVENTING ELEVENTH AMENDMENT PROHIBITIONS

The landmark *Ex parte Young,* 209 U.S. 123 (1908), decision, allowing circumvention of Eleventh Amendment prohibitions of suits against a state by suing personally a state official attempting to use the state's name to enforce state law *alleged* to be void because unconstitutional, continues to stir up comment. Professor Charles Alan Wright points out that the case contains its own illogic inasmuch as the action was brought under the Fourteenth Amendment—which runs only to states, not individuals—but that the relief sought could only be granted against a state official stripped of his cloak of sovereignty.[23] Thus is created the anomaly that enforcement of state law is "state action" for Fourteenth Amendment purposes in bringing an action, but is merely the individual wrong of a person, bearing a state official title, for purposes of the Eleventh Amendment. Perhaps the ultimate irony of *Young* is the fact that several years later this Court ruled in the *Minnesota Rate Cases (Simpson v. Shepard),* 230 U.S. 352 (1913), that the railroad rates challenged in *Ex parte Young* were constitutionally permissible. However, the *Young* doctrine of suit against state officials in their individual capacity is well ingrained in our jurisprudence.

[23] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 48 at 185 (1976).

Though the cases which have utilized *Young* are now legion, none of the cases raise the personal jurisdiction and venue procedural problems raised herein. *Every* reported case in which the *Young* doctrine has been employed has been brought in the federal judicial district in which the challenged state official was resident in his official capacity. *Every* such reported case involved application of state law by an official acting within his own state. And this evidences a procedural pattern which flows from the *Young* case itself inasmuch as that case was brought in federal court in Minnesota to challenge a Minnesota official's enforcement of a Minnesota law. *Young* involved no question of jurisdiction outside the state whose statutes were being challenged—yet the out-of-state plaintiffs faced the prospect of being subjected to the consequences of Attorney General Young's actions in their home states, not merely in Minnesota.

On the rare occasions when a plaintiff has *attempted* to bring action against a state official in a forum outside the state wherein he officiates, personal jurisdiction has been denied. In 1972, pyramid scheme promoter Glenn Turner brought suit in the District of Vermont against the attorneys general of 25 states.[24] The court found personal jurisdiction fatally lacking and ruled that Turner's proper course of action was an individual lawsuit against each attorney general in his own state. There is an appealing logic to the result inasmuch as Turner's action against the attorneys general sprang from the fact that the profit motivated activities he was promoting in each of their jurisdictions gave rise to state action against him, and was the

[24] Turner v. Baxley, 354 F.Supp. 963 (D. Vt. 1972).

source of his retaliatory complaint against the officials. It was Turner's presence in the various jurisdictions through activities of his several companies which led to the litigation against him in each of the 25 states, just as in this instant action it was Great Western United Corp.'s presence in Idaho (and submission to Idaho jurisdiction under the Idaho Corporate Take-Over Law) which gave rise to the administrative order which precipitated GWU's suit in Texas against out-of-state officials.

In 1976, the District of Idaho federal court dismissed a case, sua sponte, against members of an autonomous agency of the State of Washington, who were never present in Idaho, on the ground that maintaining such an action, though not objected to by the Washington officials, would violate due process norms.[25]

The consistent pattern of allowing suits against state officials to be brought *only* in those federal courts sited in the state of which the challenged individual was an official has been broken solely by this instant case. This action is both without precedent and unjustified, and should not be allowed as an extension of the *Young* fiction.

[25]Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F.Supp. 171 (D. Idaho 1976). Though the Washington officials had appeared in the case without challenging jurisdiction, the court ruled sua sponte that it lacked personal jurisdiction over the foreign commission members who "were never physically present in Idaho; rather their activities occurred in Washington and had an alleged effect in Idaho," with the court further observing that "[i]t is doubtful that the individual members . . . could reasonably have anticipated that their activities in Washington could subject them to personal liability in a distant [sic.] state." *Id.* at 182.

II

JURISDICTION OVER IDAHO OFFICIALS BY A TEXAS FEDERAL COURT VIOLATES DUE PROCESS AND FEDERALISM PRINCIPLES

A. Personal Jurisdiction Under the Texas Long Arm Statute Is Improperly Applied Against Idaho Officials Who Were Neither Present in Texas Nor Acting in Any Capacity in Idaho Other Than a Governmental One

1. Overview

GWU alleged, and the courts below agreed, that the defendant state officials were within the Texas long arm statute's definition of:

> * * * non-resident natural person that engages in business in [Texas], * * * , and does not maintain a regular place of business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, [whose] act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such * * * non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made * * *.[26]

Nowhere was it alleged that the out-of-state officials were among those persons *required* by Texas law to designate an agent; thus they could fall within the long arm statute purview only if they were somehow deemed to "engage in business" in Texas. The flaw in this syllogism involves the allegation that non-resident Idaho officials—acting in their individual capacity in allegedly exceeding their authority

[26]Tex. Rev. Civ. Stat. Ann. art. 2031b, § 3 (Vernon).

as state officials enforcing state law, under the *Young* theory—were engaged in "business" by acting to enforce or being charged with enforcement in Idaho of Idaho law enacted pursuant to Idaho's police power. Enforcement of Idaho law must be deemed a police power activity in which the State of Idaho, through its officials, acts in a governmental—not proprietary or commercial—capacity. Though courts have been exceedingly liberal in allowing broad scope definitions of what constitutes "doing business" under long arm statutes—so long as due process standards are met—it is inconceivable that the farthest reaches of such indulgence could place a "business" context overlay on action in a governmental capacity. Such a course would imply a commercial sense which, if applicable to state or state official action at all, could only conceivably apply to action of a proprietary or commercial nature—not governmental action.[27] The courts below, however did not address this fundamental issue in asserting that jurisdiction is available over the Idaho officials through the Texas long arm statute.[28]

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[27]*See* Martiniak, Hall v. Nevada: *State Court Jurisdiction Over Sister States v. American-State Sovereign Immunity*, 63 CAL. L. REV. 1144 (1975) in which the author suggests that a state should be immune from suit in another state if its interest is governmental, but not if its interest is merely proprietary. This ties in with this Court's extension of jurisdiction to out-of-state defendants who are engaged in commercial, profit oriented business activity or those who have caused a tort in the forum state, but rarely to others.

[28]The only reference to this issue is its cursory dismissal by the district court in its Conclusion of Law, prepared after the circuit court-ordered jurisdiction and venue hearing, that the statute's doing business terminology "has no commercial import." (Findings of Fact and Conclusions of Law, filed Apr. 21, 1977, ¶ 13 at 6.) Thus the well recognized governmental-proprietary distinction was not addressed on its merits. The circuit court made light of the issue by stating that "Idaho's 'business' is to regulate," and that Idaho conducted that "business" in Texas. 577 F.2d at 1268 (J.S. App. A-18).

Beyond the commercial overtones of "doing business" in the long arm statute sense are the pervasive constitutional due process requirements of any jurisdictional statute. One aspect is the "minimum contacts" analysis mandated by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The facts of this instant case reveal that agents of GWU physically presented themselves in Idaho to make a voluntary filing under the Idaho Corporate Take-Over Law. Other agents of GWU made inquiry of New York and Maryland officials regarding applicability of those states' takeover laws. Though Maryland and New York did nothing as a result of the inquiries, Idaho—at the request of a GWU official[29]—telecopied its comment letter requesting additional information of GWU and administrative order delaying the effective date of the tender offer to GWU in Dallas, Texas. Thus, the sole contacts with Texas were the comment letter and order sent to Texas from Idaho at GWU's request. These "contacts" hardly seem sufficient to establish the constitutionally necessary relationship with the forum jurisdiction. If the telecopying to Texas is the operative fact allowing Texas jurisdiction, would not such jurisdiction have been defeated if Idaho had required GWU's agents to come to Idaho to receive Idaho's response to the GWU filing under Idaho law, rather than using an instrumentality of interstate commerce to convey the information. Such a narrow reading and application of the "minimum contacts" principle would be unsound, yet the courts below did find that the contact of the Idaho officials met *International Shoe* criteria.

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[29]Testimony of Mr. Metzger. (Trial Tr., 441) (A. 292).

International Shoe, however, makes it clear that the contacts contemplated must be of substance, not merely fabricated from happenstance:

> Whether due process is satisfied must depend * * * upon the quality and the nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. * * *
>
> * * * [T]o the extent that a corporation exercises the privilege of conducting activities in a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within a state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[30]

The facts of the case and substance of this Court's decision make it clear that *International Shoe* standards, allowing use of a foreign state forum under certain circumstances, was directed *exclusively* at commercial, profit-oriented enterprise. It cannot seriously be maintained that the Idaho officials involved herein would be entitled to enjoy any "benefits and protections" of the laws or courts of Texas in any attempt to come to Texas in a governmental capacity to apply and enforce Idaho law. No Texas statutory law would allow such conduct, nor would any articulated legal principle—in fact, Texas' sovereignty would preclude it. Actually, quite the converse was true; Texas law—the long arm statute—was used against the Idaho officials. Clearly, the justification for exercising long

[30]326 U.S. at 319.

arm jurisdiction consistent with the due process requirements of *International Shoe* and its companion cases is missing in this instant action. Yet another problem surrounds the concept of exercising a "privilege of conducting activities in a state."[31] The phrase implies that the forum state accedes to the conduct of certain activities within its borders, and that a charge exacted for allowing such conduct is the amenability of the acting person or entity to suit in the forum's courts. This phrase would mean that for due process to be satisfied Texas would have to grant the Idaho officials a right of conducting Idaho governmental activities—exercising Idaho police powers—within Texas. Not only does such a process defy federalism and sovereignty principles, but it simply did not occur.

2. Appellants were not "engaging in business" in Texas.

In determining the propriety of asserting Texas long arm jurisdiction, courts must approach the issue on two levels of inquiry. On the first level, the exercise of jurisdiction must be within some statutorily conferred authority.[32] If the bare statutory requirements of the long arm statute have been satisfied, a court must next determine whether the defendant has had sufficient minimum contacts with the state wherein the court has jurisdiction so as to permit an exercise of that jurisdiction over that defendant consonant with fundamental fairness and due process consid-

[31]*See also* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[32]Product Promotions, Inc. v. Costeau, 495 F.2d 483, 492 (5th Cir. 1974); Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973).

erations.[33] The burden of demonstrating that a court may properly assert long arm jurisdiction over a defendant lies with the plaintiff,[34] rather than with the imagination of the court. It appears, however, that in this instant case attention was focused solely on the second, due process, issue without ever demonstrating the nexus of the Idaho officials to the first issue of whether the Texas long arm statute by definition covered them.

Under the above-quoted portion of section 3 of the Texas long arm statute, jurisdiction over a non-resident person who engages in business in Texas is proper in any action arising out of that business.[35] Section 4 defines acts which constitute "doing business" and includes the catch-all phrase: "other acts that may constitute doing business."[36] Since no tort or contract is involved herein resort must be had to the catch-all provision regarding "other acts." Yet, the alleged "business" activity was never defined, other than the circuit court's assertion that "Idaho's 'business' is to regulate."[37] No attempt was made to analyze how governmental regulation might be deemed synonymous with traditional notions of "business" activity.

[33]International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson v. Denckla, 357 U.S. 235 (1958); Kulko v. Superior Court, 436 U.S. 84 (1978).

[34]Product Promotions, Inc. v. Costeau, 495 F.2d 483, 489-90 (5th Cir. 1974).

[35]TEXAS REV. CIV. STAT. ANN. art. 2031b, § 3 (Vernon).

[36]"* * * [W]ithout including other acts that may constitute doing business, any * * * non-resident natural person shall be deemed doing business in this State by entering into any contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. TEXAS REV. CIV. STAT. ANN. art. 2031b, § 4 (Vernon).

[37]577 F.2d at 1268 (J.S. App. A-18).

Further focusing attention on the first level of long arm jurisdiction inquiry as it relates to this case, it readily becomes apparent that of all the named officials of Idaho, Maryland, and New York who were sued by GWU, *only one* defendant—Idaho Director McEldowney—took any affirmative action whatsoever in any state. Defendant-Appellant Idaho Attorney General Kidwell (now, Leroy) at no time took action or threatened to take action against GWU, nor was he ever even contacted by GWU. His sole relationship to this lawsuit is the fact that the Idaho Corporate Take-Over Law[38] charges him with a duty of enforcement only upon reference of a matter to him by the Director of the Idaho Department of Finance. No such reference was ever made or alleged. The single defendent who engaged in any activity whatsoever was Director of the Idaho Department of Finance McEldowney who: (*i*) reviewed in Idaho the registration statement voluntarily filed in Idaho by GWU under the Idaho Corporate Take-Over Law, *(ii)* authorized his Deputy Administrator for Securities Baptie to issue a comment letter about the registration statement and a request for additional information by transmitting the same—at GWU's request—by telecopier from Idaho, *(iii)* issued an administrative order from Idaho, by the same means of transmission, delaying the effective date of GWU's proposed tender offer; and *(iv)* acted to defend himself when sued in Texas by GWU. Nowhere

[38]IDAHO CODE § 30-1509 (Supp. 1978). Under this section, the Director may bring an action for injunctive relief in the name of the state in any court of competent jurisdiction, "or he may refer the matter to the attorney general or the proper prosecuting attorney." This is not to imply that it would not be proper for the attorney general to exercise his general powers in behalf of the State of Idaho to seek injunctive relief of a violation of Idaho law.

during the course of the proceedings herein has reference been made to any legal authority whatsoever even intimating that such a course of activity by an Idaho official, enforcing within his own state boundaries an Idaho law, might somehow be construed as "doing business" in Texas merely because the net result of his regulation in Idaho was felt in Texas. All the other defendants in GWU's suit, including Appellant Kidwell, could hardly be deemed to be "doing" anything—since they took no action whatsoever—let alone "doing business" in Texas. The Texas Supreme Court has recently refused to engage in defining semantical nuances surrounding the concept of "doing business" for Texas long arm jurisdiction purposes,[39] reaffirming that the statute reaches as far as federal constitutional requirements will permit, while emphasizing that its construction allows courts to focus on constitutional issues rather than engaging in technical and abstruse attempts time and again to define "doing business." However, in the *U-Anchor* case a statutorily-defined form of "doing business"—a contract—was involved, as opposed to this case where no previously identified form of business activity forms the nexus for asserting long arm jurisdiction. Somehow, the threshold level of inquiry must meet legal criteria before one may proceed to the next, constitutional, level of inquiry.

3. Constitutional due process and fundamental fairness were lacking.

Assuming arguendo that the first step of the two step long arm jurisdiction analysis had been satisfied, assertion of jurisdiction must fail under the second level of inquiry.

[39]U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 98 S.Ct. 1235 (1978).

The sum and substance of the alleged "activity" in Texas was the claim that action, real or threatened, in other states had a practical effect of regulating GWU's Texas-based activities—had consequences in Texas. Yet, if GWU chose to conduct its operations in the proposed tender offer here involved from some state other than Texas the same "effect" or "consequence" rationale would apply to assertion of jurisdiction over the Idaho officials by a court in that state. And, if GWU chose to conduct its takeover activities herein from more than one state, under the same rationale jurisdiction would be available in any of those several states. Such a conclusion conflicts sharply with the previously noted *Hanson v. Denckla* and *International Shoe* requirements. Contrary to the unwarranted speculation indulged in by circuit court,[40] in all likelihood activity in Texas by Idaho officials would make them subject to sanction or even penalty under Texas law rather than subject to its benefits and protections. The result-oriented discussion of these constitutional issues by the courts below fail to meet the further *International Shoe* requirement that purposeful conduct by a defendant must be of such a nature that it should be foreseeable to that defendant that he might thereby be subjecting himself to the forum's jurisdiction.[41]

Hanson v. Denckla further teaches that a forum state:

> does not acquire • • • jurisdiction by being the "center of gravity" of the controversy, or the most convenient

[40]577 F.2d at 1269 (J.S. App. A-20 - A-21). We deal here with a mere administrative order emanating from Idaho, not a judicial decree and full faith and credit issues.

[41]*See* Kurland, *The Supreme Court, The Due Process Clause and The In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569, 621 (1958).

> location for its litigation. The issue is personal jurisdiction, not choice of law.[42]

The circuit court use of the concept of "regulation of Great Western's Texas-based business activities" and implication regarding the district court's concept of "impact on shareholders"[43] as justification for allowing jurisdiction in Texas smacks of the improper "center of gravity" reasoning which this Court has rejected. Recently, this Court offered new guidance and placed some restraints upon certain excesses in assertion of personal jurisdiction over non-resident defendants in *Shaffer v. Heitner*, 433 U.S. 186 (1977). The Court admonished:

> [I]f the defendant consented to the jurisdiction of the state courts or was personally served within the State, a judgment could affect his interest in property outside the State. But any attempt "directly" to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of State's power.[44]

Applying the *Shaffer* rationale, it appears manifest that the courts below sanctioned the very type of assertion of extraterritorial jurisdiction which that case proscribes. The Idaho officials were neither served in Texas, nor did they consent to jurisdiction of courts in Texas; the effect of the holdings below is, in essence, to affect the property right of elected and appointed officials to exercise their statutory obligation to enforce Idaho law. Perhaps "property right" is an unusual concept to apply to that which

[42] 357 U.S. at 254. This basic principle was recently reiterated in *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977).

[43] 577 F.2d at 1270 (J.S. App. A-23).

[44] 433 U.S. at 197.

a state official deals with when acting in an official capacity to enforce a state law—yet, under whatever "label" applied, a state and its officials do have some right in the laws of their state and their ability and obligation to apply therein such laws. The right affected is no less a right than that over property considered in *Shaffer*—and the purported assertion of extraterritorial jurisdiction by the court in Texas over the use of Idaho law is no less offensive.

It is conceivable that the district court below was initially concerned with a notion of judicial economy in deeming it proper for the Idaho, Maryland, and New York officials to come to Texas and defend in a single action, rather than have GWU be forced to bring individual suits in each state. If this were an unarticulated goal, it had a fatal flaw as far as Idaho was concerned. Though GWU did name as defendants Idaho Attorney General Kidwell and Director of the Idaho Department of Finance McEldowney, there remained in Idaho yet another official—the Ada County Prosecuting Attorney[45]—who had the same authority upon reference by Director McEldowney to seek injunctive relief against GWU as did Attorney General Kidwell.

Implications of the "practical effects" or "consequences" tests for jurisdiction over the non-resident Idaho officials are staggering. The clash with ordinary notions of due process and fundamental fairness are obvious enough when private citizens are involved, but the application of such rationale to state officials performing governmental duties in their "home" states—particularly as applied to officials subjected to personal jurisdiction merely because they were

[45] IDAHO CODE § 30-1509 (Supp. 1978).

charged with some duty which they had taken no steps to implement—casts a pall over attempts to enforce state laws generally. Extension of the rationale could be employed in a host of situations to disrupt state governmental activities and well-settled litigation procedure. For example, California officials who applied that state's air quality laws—which impose a higher emission standard than applicable federal law—to automobiles coming into California from any source could be required to appear in federal court in Michigan to defend there a constitutional challenge to the validity of the California laws in an action brought by a Michigan auto manufacturer. Grounds for assertion of Michigan jurisdiction would be that the California laws had a "practical, extra-territorial, effect" or "consequences" in Michigan, or "amounted to the regulation" of the auto manufacturer's Michigan-based business activities.

That states are entitled to have laws with an extraterritorial effect has long been settled in domestic relations law involving actions over the status of marriage under circumstances where personal jurisdiction over one of the parties was lacking (and, thus, property rights could not be adjudicated in the forum state). Even state laws regulating corporate securities in a more traditional sense have practical, extraterritorial, effects and consequences affecting shareholder rights and opportunities regardless of where those shareholders live. For example, Delaware's general corporation law has an effect upon all shareholders of all Delaware corporations wherever those shareholders live. The Delaware law determines when, and the extent to which, shareholders have appraisal rights in connection

with certain corporate transactions; it controls the conditions under which a Delaware corporation can use assets to repurchase its own shares from holders living anywhere in the world; it regulates the ability of residents of Texas, California, or any other state to vote cumulatively the shares they own in a Delaware corporation; and it generally limits the rights of shareholders anywhere to approve various types of corporate transactions. Shareholders voluntarily decide to purchase shares in a Delaware corporation, much like GWU voluntarily decided to propose a partial tender offer for shares of a corporation whose principal activities were in Idaho and, thus, known to be subject to the jurisdiction of the Idaho Corporate Take-Over Law. Could it conceivably be argued that the Delaware corporation's shareholder living in Texas could successfully entertain a lawsuit in federal court in Texas to challenge the constitutionality of the Delaware corporation laws on the ground that the law affected him in Texas. The answer must be in the negative, just as it must be in the case of the litigation brought by GWU herein.

In dismissing Washington state official defendants from an action brought in the District of Idaho because its forum lacked personal jurisdiction over individual members of an autonomous state agency when they "were never present in Idaho; rather their activities occurred in Washington and had an alleged effect in Idaho,"[46] the court noted that it was "doubtful that the individual members * * * could reasonably have anticipated that their activity in Washington could subject them to personal jurisdiction in a distant

[46]Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F.Supp. 171, 182 (D. Idaho 1976).

state."[47] The analogy to the present case against Idaho officials and an alleged effect in Texas is obvious, and the conclusion of the Idaho federal court should be applied herein.

The 1977 Texas Supreme Court decision in *U-Anchor Advertising, Inc. v. Burt,* 553 S.W.2d 760 (Tex. 1977), *cert. denied,* 98 S.Ct. 1235 (1978), gives further credence to the claim that no personal jurisdiction is available under the Texas long arm statute over the Idaho officials. The facts bearing on personal jurisdiction were carefully weighed by the court in reaching its conclusion that due process standards would be violated if long arm jurisdiction were to be exercised over the out-of-state defendant. U-Anchor, a Texas corporation, caused Burt, an Oklahoma resident, to be served with process—as were the *Kidwell* defendants—through substituted service on the Texas Secretary of State. Burt entered a special appearance to challenge jurisdiction. Involved was a dispute over a written contract executed by the parties in Oklahoma, after solicitation there of Burt by a U-Anchor salesman, for placement of advertising displays at several locations along Oklahoma highways. Burt was to pay monthly for the displays by mailing payments to U-Anchor in Texas. The displays were constructed in Texas and erected by U-Anchor at the designated Oklahoma locations. There were no other contacts with Texas. U-Anchor brought suit after Burt had mailed 6 or 7 monthly payment cheques to them. The relevant portion of the long arm statute alleged to apply was that which specifically provided that "doing business" in Texas included the act of "entering into contracts * * * with a resident of Texas to be performed in whole or in part by either party in the State."[48] After an exacting review of constitutional standards, and particularly *Shaffer v. Heitner,* the court concluded that Burt's contacts with Texas were so minimal and fortuitous that he could not be said to have purposefully conducted business activities in Texas, and was merely a passive customer of a Texas corporation who never sought, initiated, nor profited from his single fortuitous contact with Texas.[49] Further considering jurisdiction on federal due process grounds, the court concluded that traditional notions of fair play and substantial justice would be offended by allowing long arm jurisdiction over Burt, concluding that, while the case may have been within the literal dictates of the Texas long arm statute, the due process clause of the Fourteenth Amendment forbade Texas courts from exercising personal jurisdiction over him. The court made the cogent observations that "[n]arrow factual distinctions will often suffice to swing the due process pendulum" and that "important constitutional questions prove immune to solution by checklist."[50]

The *U-Anchor* analysis of both purposeful business activities and federal due process standards is most apropos to this instant case. The out-of-state officials had minimal and fortuitous contacts with Texas, occasioned solely as a result of activity outside of Texas by GWU. These officials were passive recipients of inquiry and voluntary filing by GWU who never sought, initiated, nor profited from their

[47] *Id.* at 180.

[48] Tex. Rev. Civ. Stat. Ann. art. 2031b, § 4 (Vernon).

[49] 553 S.W.2d at 763.

[50] *Id.* at 764.

single fortuitous contact with Texas. The suit against them should not have been entertained by a federal court in Texas.

In every instance where use of a foreign forum has been authorized by the courts, jurisdiction was directed at defendants who were engaged in commercial, profit-oriented enterprise. Recently, in *Kulko v. Superior Court* 436 U.S. 84 (1978), this Court recognized that the absence of "commercial transactions in interstate commerce" wherein a defendant "sought a commercial benefit" precluded an analogy to commercial activity cases as a basis for assertion of personal jurisdiction.[51] In *Kulko,* this Court further concluded that a court's reliance on a defendant "having caused an 'effect' in [the forum state] was misplaced"[52] because the defendant derived no benefit from any activities relating to the forum. These *Kulko* conclusions fit the facts of this action like a glove. In the first instance, the Idaho officials were not engaged in commercial transactions in interstate commerce wherein they sought a commercial benefit by acting in a governmental capacity regarding Idaho law. Since there is no benefit at all to the Idaho defendants from activities relating to Texas, any jurisdiction based upon their having caused an "effect" in Texas is likewise misplaced. Though it might be argued that the State of Idaho itself—as a sovereign state, subject to Eleventh Amendment protections—derived a benefit from any "effects" in Texas generated by the action (inaction) of Idaho officials regarding Idaho law, such a

[51]436 U.S. at 97, 101 (1978).
[52]*Id.* at 96.

benefit does not run to those officials in their individual capacity, stripped of their sovereign immunity cloak. GWU cannot have it both ways under the *Young* doctrine.

B. Enforcement by an Idaho Official of State Law Which Allegedly Conflicts With a Portion of the Securities Exchange Act of 1934 Does Not Constitute a "Violation" of Said Act for Purposes of Federal Court Jurisdiction Thereunder When No Specific Proscription Thereof has Been Breached.

A primary element of the case against the out-of-state officials involved herein was GWU's allegation that section 27 of the Securities Exchange Act of 1934[53] served not only as a grant of subject matter jurisdiction but also as a grant of personal jurisdiction and venue. Thus, an action would lie under section 27 *only if* all three requirements —personal and subject matter jurisdiction and venue— were met.

1. Subject Matter Jurisdiction Under Section 27 of the Securities Exchange Act of 1934 is Lacking.

Before wandering off in the forest of federal law regulating securities transactions it is well to pay heed to this Court's recognition that entities which give rise to securities and the resulting securities market—corporations—"are creatures of state law."[54] The Court also recognized that when corporate investors commit their money to a corporation and its officers and directors they do so with the understanding that most of the activities of the cor-

[53]15 U.S.C. § 78aa (1970).
[54]Cort v. Ash, 422 U.S. 66, 84 (1975); Santa Fe Indus. Inc. v. Green, 430 U.S. 462, 479 (1977).

poration and those who chart its course will be governed by state, not federal, law.[55] There is no such thing as a federal law of corporations notwithstanding the fact that, because of the interstate commerce features of many securities transactions, there is substantial federal regulation of corporate securities transactions in a general scheme of state regulation. That there is no judicial desire to federalize that portion of corporate law dealing with securities transactions is evident from this Court's recent decision in *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 469 (1977). The securities industry represents the inevitable growth of those corporations which create securities, and Congress has seen fit to regulate a part of that industry while recognizing, in the only regulatory scheme germane to this lawsuit, the legitimacy of nonconflicting state laws concerning securities activities.[56]

In the context of the litigation herein, the defendant state officials are not "participants in" the regulated securities field—thus subject to the obligations required of such participants—but are themselves *regulators* of that industry, acting in concert with the federal regulators thereof. What the state corporate takeover laws challenged by GWU attempt to achieve in the field of cash tender offers is provision of additional protective measures for shareholders beyond the minimal standards offered by federal law governing takeover bids against target companies chartered in or with substantial assets, primary offices, and activities in the state asserting jurisdiction.

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[55] *Id.*

[56] Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1970).

In 1968 there was engrafted onto the already existing Securities Exchange Act of 1934 the Williams Act amendments which provided for minimal informational disclosure and registration for cash tender offers affecting a 10% or greater portion of the outstanding shares of a company, the control of which was sought by another.[57] As is developed at considerable length below in discussion of the issues of federal preemption and undue burden on interstate commerce, the Williams Act and its legislative history demonstrates no express or implied congressional intent that federal law be the sole source of regulation of cash tender offers.

The Williams Act regulates tender offers in three ways. First, there is a disclosure requirement which requires takeover bidders (tender offerors or raiding companies) to file a statement with the federal Securities and Exchange Commission (hereafter SEC) indicating, among other things, the background and identity of the offeror, the source and amount of funds to be used in making the tender offer, and the offeror's plans with respect to the target company.[58] There are no provisions for automatic review of the sufficiency of these disclosures nor for comment thereon by the SEC. Second, there are specific benefits for target company shareholders who elect to tender their shares, including the following: *(i)* shareholders who elect

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[57] Public Law 90-439; Act of July 29, 1968, 82 STAT. 454. Codified at sections 13(d, e) and 14 (d-f) of the 1934 Act, 15 U.S.C. §§ 78m(d, e) & 78n(d-f) (1970). Though the Williams Act as originally passed was triggered only after 10% or more shares were acquired, 1970 amendments lowered the threshold to 5%.

[58] Section 14(d)(1) of the 1934 Act, 15 U.S.C. § 78n(d)(1) (1970).

to tender may exercise a right to withdraw their shares during the first seven days of the tender offer and at any time sixty days from the commencement of the offer;[59] *(ii)* where the tender offer is for less than all the outstanding corporate shares, and more than the requested number of shares are tendered, the tendered shares are to be taken up pro rata by the offeror during the first ten days of the offer;[60] and *(iii)* if, during the course of the offer, the amount tendered for shares is increased, all tendering shareholders are to receive the additional compensation, even if they tendered their shares before the price increase was announced.[61] Third, the Williams Act contains a broad anti-fraud provision, which makes untrue statements or omissions of material fact, and engaging in fraudulent, deceptive, or manipulative acts or practices regarding reporting, inviting tenders, or solicitation of securities holders unlawful.[62] Though the purpose, objectives, and legislative history of the Williams Act was recently exactingly analyzed by this Court in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), nowhere is there indicated an intent to displace state regulation of tender offers, notwithstanding the fact that Virginia had a state corporate takeover law prior to the Williams Act's initial passage, and Ohio and Nevada added takeover laws before the Williams Act was amended in 1970.

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[59]Section 14(d)(5) of the 1934 Act, 15 U.S.C. § 78n(d)(5) (1970).

[60]Section 14(d)(6) of the 1934 Act, 15 U.S.C. § 78n(d)(6) (1970).

[61]Section 14(d)(7) of the 1934 Act, 15 U.S.C. § 78n(d)(7) (1970).

[62]Section 14(e) of the 1934 Act, 15 U.S.C. § 78n(e) (1970).

It is clear, too, from numerous judicial interpretations of the underlying provisions of the Securities Exchange Act of 1934 and its legislative history that its overall purpose was to prevent and punish fraud in the trading and sale of securities.[63] The entire Act is aimed at stock manipulators—not state officials who are themselves attempting to regulate.

The jurisdictional section of the Securities Exchange Act of 1934, section 27,[64] provides that United States district courts shall have exclusive jurisdiction of: *(i)* violations of the Act, and *(ii)* all suits in equity and actions at law brought to enforce any liability or duty created by the Act. The theory advanced by GWU and accepted by the courts below is that the various state official defendants have "violated" the Act because the state laws they are charged with enforcing constitute the type of "conflict"

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[63]*See, e.g.* Hooper v. Mountain States Securities Corp., 282 F.2d 195, 205 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961) ("the statute was designed to put an end to frauds in the sale and trading of securities").

[64]15 U.S.C. § 78aa (1970):

> The district courts of the United States, * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. * * *

with the Act which section 28(a)[65] does not allow state laws to create. Under this theory, a "conflict" between state and federal law, should one exist, is tantamount to the breach of an affirmative duty and a "violation" of the Act subject to court action under section 27. The grave flaw in the premise supporting this syllogism is that no affirmative duty is anywhere placed by the Act upon states or their officials which *can* be "violated." Even if a section 28(a) "conflict" did exist between state and federal law, such conflict is in no terms made illegal or a "violation" by any provision of the Act. All section 28(a) provides is that state regulation which *does not* "conflict" *is permitted.* Though it is possible to understand how an Idaho or other state law might be a nullity and unenforceable under section 28(a) if conflict with the federal law is found, it is not possible to imagine how such an occurrence could ever rise to the level of a "violation" of the Act. The problem which the courts below failed to come to grips with is that section 28(a), on its face or by implication, prohibits no conduct, nor does it prescribe acceptable conduct. None of the language of the 1934 Act or its amendments which does impose affirmative obligations—the failure of which to perform would constitute a "violation" of the Act—and is accompanied by mandatory words, such as "shall," is in evidence in section 28(a). Yet, this section provides the sole basis upon which GWU's claim of a "violation" of the Act rests. Moreover, there is not a single case decided

[65] 15 U.S.C. § 78bb(a)(1970):

(a) * * * Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

under section 28(a) in which there has ever been found a "violation" of the Securities Exchange Act of 1934 or its amendments because of enactment or enforcement of a state law with an alleged "conflict."[66]

Pursuit of the argument that enforcement of a conflicting state law constitutes a "violation" of the Act for section 27 purposes would lead to the inevitable conclusion that state officials who acted to enforce a conflicting state law would be deemed "willful violators" of the Act and subject to fine or imprisonment under section 32(a) thereof.[67] This same reasoning would lead to the conclusion that a federal official who acted ultra vires in enforcing portions of the 1934 Act would also be deemed to have "violated" the Act, and subject to fine or imprisonment. Clearly, the intent of section 28(a) is *permissive* rather than forbidding. Subject matter jurisdiction under section 27 is simply lacking.

2. Personal Jurisdiction Over the Idaho Officials Under Section 27 of the Securities Exchange Act of 1934 is Lacking.

Assuming arguendo that the initial inquiry into the requirement of subject matter jurisdiction under section 27 has been satisfied, it remains inconceivable that personal jurisdiction thereunder could be asserted over the defend-

[66] It is not clear from case law what the term "conflict" means in this context. The SEC has interpreted "conflict" narrowly as comprehending only state regulation making *impossible* a compliance with federal law. *See, e.g.* SEC Investment Advisers Act Release No. 40 (Feb. 5, 1945), in 3 CCH FED. SEC. L. REP. ¶¶ 56,374-77, at 44,077-79; *id.* No. 8 (Dec. 12, 1940), in 3 CCH FED. SEC. L. REP. ¶¶ 56,420-21, at 44,086.

[67] 15 U.S.C. § 78ff(a) (1970), which provides that willful violators of the Act are subject, upon conviction, to be fined up to $10,000 or imprisoned for not more than five years.

ant out-of-state officials. The due process and fundamental fairness limitations applicable to the defendants, previously discussed above regarding the Texas long arm statute, are equally applicable to personal jurisdiction inquiry under section 27 of the Securities Exchange Act of 1934. In addressing this issue, the courts below did not rely upon any contacts peculiar to Texas in supporting findings of personal jurisdiction under section 27, but, instead, again employed the "practical, extraterritorial, effect" and "consequences" rationales which resulted in upholding personal jurisdiction. The fault with such a conclusion lies in the fact that section 27 merely relates to the place where a violation occurs, not to the place where some adverse consequences or effects occur.[68] This extraterritoriality argument is tantamount to alleging that the so-called "violation" is a tort and that section 27 has the same effect as the Civil Rights Act of 1871 and its companion jurisdictional statute.[69] Yet, as discussed above concerning the Texas long arm statute, it was nowhere shown that the Idaho officials took any action whereby they could fairly be said to have purposefully availed themselves of action in Texas which might invoke the "benefits and protections of its laws."[70]

Further, as earlier noted, only one of the two Idaho official defendants took any action whatsoever; Idaho

[68] *See, e.g.* Kulko v. Superior Court, 436 U.S. 84, 96-97, 101 (1978).

[69] 42 U.S.C. § 1983 (1970), and its jurisdictional counterpart, 28 U.S.C. § 1343(3) (1970).

[70] Hanson v. Denckla, 357 U.S. 235, 253 (1958); Shaffer v. Heitner, 433 U.S. 186, 216 (1977); Kulko v. Superior Court, 436 U.S. 84, 94, 101 (1978).

Attorney General Kidwell took no action, thus availed himself of no laws—not even Idaho's. The courts below wrongly asserted personal jurisdiction over the Idaho officials under section 27.

III

VENUE IS IMPROPERLY BASED IN TEXAS IN AN ACTION BROUGHT IN TEXAS BY A TEXAS RESIDENT AGAINST IDAHO OFFICIALS TO INVALIDATE AN IDAHO LAW ALLEGED INVALID ON THE GROUNDS IT IS PREEMPTED BY THE SECURITIES EXCHANGE ACT OF 1934 OR UNDULY BURDENS COMMERCE

A. Under the Jurisdiction and Venue Section of the Securities Exchange Act of 1934 a "Violation" Did Not Occur in Texas So As to Sustain Venue in That Judicial District

Section 27 of the Securities Exchange Act of 1934 contains a built-in venue provision keyed, as personal jurisdiction, to the notion of a "violation" of the Act. The courts below "found" venue on the theory that Idaho enforcement of the Idaho Corporate Take-Over Law "violated" the 1934 Act and that, as a result of "effects" or "consequences" in Texas, the violation "occurred" in Texas for venue purposes. The district court, in supporting its venue finding, cited but one case, *British-American Ins. Co. Ltd. v. Lee,* 403 F.Supp. 31 (D. Del. 1975), which involved insider trading in a normal securities action, is wholly inapposite to the facts of this instant case, and concluded that venue

was improper in the district in which the action was brought.[71]

Though section 27 has existed for 45 years there is not a single reported case under it in which its venue provisions have been applied to a state official under any circumstances, nor have the Act's venue provisions ever been applied to federal officials alleged to be acting illegally in administering the Act of which section 27 is a part.

The circuit court's reliance upon *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515 (8th Cir. 1973) is likewise misplaced. In that case, a claim was alleged under § 10(b) of the 1934 Act and Rule 10b-5 as a result of misrepresentations allegedly made in a tender offer to a Canadian corporation for shares of another Canadian corporation. The defendant corporation *deliberately* mailed into the United States to target company shareholders letters and other materials containing deliberate misrepresentations and inducements which caused the plaintiffs to suffer losses. The court cited at least eight "contacts" with the U.S. plaintiffs by the Canadian defendant and noted:

[71]In the cited case, the defendants were a non-resident corporate president and his wife, both sued by the corporation and charged with personal wrongdoing in connection with corporate assets. The court concluded that there were insufficient contacts between the defendants and Delaware on which to base venue in federal court in that State. The court concluded that the defendant husband's visits to Delaware did not constitute an " 'integral part of' or 'of material importance to' or even a substantial step in perpetrating the * * * alleged violations of the 1934 Act." (403 F.Supp. at 35.) While the court recognized that the foreign activities of the defendants had an "impact" on the value of shares of plaintiff's stock held by a trust company in Delaware, it could not place venue in Delaware because "no direct act constituting a violation of the 1934 Act occurred in" the District of Delaware. 403 F.Supp. at 35-36.

> The incidents were essential elements in a slowly unfolding scheme to defraud the plaintiffs involving the use of the mails and instrumentalities of interstate commerce. Jurisdiction is not lost because some of the significant steps in the fraudulent scheme took place in Canada. [Citations omitted.] Here, as in *Leasco*, the scales are tipped in favor of applicability because misrepresentations were made in the United States.[72]

The court concluded that the fact that the defrauded party had initiated the communication would not defeat jurisdiction and venue based upon use of an instrumentality of interstate commerce to communicate deliberate misrepresentations from Canada to the United States.[73] A fundamental element in commission of the tort of fraud in *Travis* was the deliberate act of sending from Canada into the United States information known to be wrong with the intent that it be detrimentally acted upon in the U.S. Analogy to the facts of this instant case is not apt. Here, GWU initiated contact with Idaho in an effort voluntarily to comply with Idaho law. There was nothing "fraudulent" about any matters in the course of dealings between GWU and Idaho which came to rest in any state. The circuit court below made much issue over transmission of Baptie's comment letter outlining objections to the GWU disclosure from Idaho to Texas by a medium of interstate commerce.[74] It is difficult to give much credence to use of this rationale as the premise for finding venue in Texas since the same "effect" or "consequence" in Texas would have been felt

[72]473 F.2d at 526 (*citing* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972), which also involved a § 10(b) violation).

[73]*Id.* at 527.

[74]577 F.2d at 1272 (J.S. App. A-29).

by GWU even if Idaho had required GWU officials to come to Idaho to receive any comments on their filing, rather than transmitting the comments and order delaying the tender offer by an instrumentality of interstate commerce. The venue problem goes to the question of where "the act or transaction constituting the violation occurred,"[75] not where "effects" or "consequences" of any such act or transaction occurred. If the "violation" can be said to be enforcement of the Idaho law, then the act or transaction of violating section 27 can only have occurred in Idaho where all complained-of actions originated. Though Idaho action was delivered into Texas causing a consequence there, the action was complete when taken in Idaho and only "occurred" in Idaho. As this Court has held:

> The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of overriding policy, is to be given a "liberal" construction.[76]

It was clearly wrong herein to allow a "liberal" manufacture of venue under portions of federal law not applicable to state officials or the facts of this case and a theory of the place of occurrence which defies logic.

B. Under the General Federal Venue Law the Claim Against the Idaho Officials Arose in Idaho, not Texas

The applicable federal venue statute provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district where all the defendants reside, or

[75]Section 28(a), 15 U.S.C. § 78bb(a) (1970).

[76]Olberding v. Illinois Cent. R.R. Co., 346 U.S. 338, 340 (1953) (reversing for improper venue a judgment following a trial on the merits).

> in which the claim arose, except as otherwise provided by law."[77]

As the circuit court properly noted, a claim may arise, as a matter of law, in only one judicial district.[78] The problem, thus, becomes that of determining where "the claim arose." Though the circuit court opined that the single place where the restraint of the Idaho order delaying the effective date of GWU's tender offer occurred was Dallas, this reasoning seems predicated on the fact that GWU was restrained from making an offer "to Sunshine shareholders who reside in districts throughout the country."[79] If GWU had been restrained from making its tender offer solely to Idaho shareholders would the same logic apply. The fault in the result reached is application of the "effects" or "consequences" test, utilized by the courts in assessing personal jurisdiction issues, to the more narrow concept of venue.

There are, however, special venue considerations which apply to situations where state officials are sued based on rules or actions instituted in the course of their official duties at their official residence. In such circumstances, the claim arises *solely* in the judicial district in which the official actions and duties were performed--in this case, the District of Idaho.[80] Applying a "weight of contacts" test

[77]28 U.S.C. § 1391(b) (1970).

[78]577 F.2d at 1273 (J.S. App. A-30) (*citing* C. Wright, A. Miller & F. Cooper, Federal Practice and Procedure, *Jurisdiction* § 3806 at 28-29 (1976)).

[79]577 F.2d at 1273 (J.S. App. A-31).

[80]*See* O'Neill v. Battisti, 472 F.2d 789 (6th Cir. 1972), *cert. denied sub nom.*, Heitzler v. O'Neill, 411 U.S. 964 (1973); Weil v. New York State Dep't of Trans., 400 F.Supp. 1364 (S.D. N.Y. 1975); United Dairy Farmers Co-op v. Milk Control Comm'n, 47 F.R.D. 1 (W.D. Pa. 1968), *transferred*, 335 F.Supp. 1008 (M.D. Pa. 1971), *aff'd*, 404 U.S. 930 (1971).

similar to that employed by the circuit court herein, a New York federal court reasoned:

> [C]ourts have used the "weight of contacts" test to determine proper venue. In the case at bar the clear weight of the contacts is in Albany, which is located in the Northern District of New York. There the determination was made as to the number and identity of those to be laid off. If there was any violation of the plaintiff's rights it occurred there. Moreover, that is the situs where defendants perform their official duties.[81]

Though the effect on the plaintiff herein was felt in Texas, the acts by the Idaho defendants all occurred in Idaho, and Idaho is the district in which the defendants perform their official duties. Since venue is a defendant's right, a contacts test should relate to a defendant's contacts with the judicial district in which suit is brought, not the district of a plaintiff's alleged misery.[82] As a Pennsylvania federal court has held:

> The defendants are being sued in their official capacity as officers of the Commonwealth of Pennsylvania. As such, their official residence is in the State Capitol, Harrisburg, in the Middle District of Pennsylvania and venue of the action is properly laid in that District.[83]

[81]Weil v. New York State Dep't of Trans., 400 F.Supp. 1364, 1365 (S.D. N.Y. 1975).

[82]*See e.g.* Honda Associates, Inc. v. Nozawa Trading, Inc., 374 F.Supp. 886, 889-92 (S.D. N.Y. 1974). *See also* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, *Jurisdiction* § 3806 at 35 (1976). The "weight of contacts" test there described has applied solely in the context of antitrust cases.

[83]United Dairy Farmers Co-op v. Milk Control Comm'n, 47 F.R.D. 1, 3 (W.D. Pa. 1968), *transferred*, 335 F.Supp. 1008 (M.D. Pa. 1971), *aff'd*, 404 U.S. 930 (1971).

The same logic applies herein; the same conclusion should be reached. Venue of the action is only proper in the District of Idaho.

It further appears that the circuit court was guided in its venue conclusion by thoughts of judicial economy, noting that if Maryland and New York officials had, like Idaho, asserted jurisdiction "there would have been no district where all the defendants resided."[84] The obvious response is that GWU should have been required in the first instance to bring separate actions in the Districts of Idaho, Maryland, and New York. Though judicial economy may be an appealing concept to those on the bench of already overburdened federal courts, it is not a form of relief that Congress has provided for other than through Multidistrict Litigation means. Moreover, such reasoning overlooks the fact that yet another Idaho official who had jurisdiction to enforce the Idaho Corporate Take-Over Law through court action seeking injunctive relief remained safely in Idaho, unnamed in this instant action.[85] Thus, to obtain complete relief, GWU would have had to bring yet another action, in the District of Idaho, to achieve its goal of enjoining all Idaho officials with jurisdiction to halt their proposed tender offer.

The only proper federal judicial district in which venue lay in this action was the District of Idaho.

[84]577 F.2d at 1273 (J.S. App. A-31).

[85]IDAHO CODE § 30-1509 (Supp. 1978) (the Ada County Prosecuting Attorney).

IV

THE IDAHO CORPORATE TAKE-OVER LAW IS NOT PREEMPTED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION[86]

A. Though Congress Reserved to the States Under Section 28(a) of the Securities Exchange Act of 1934 the Power to Regulate Corporate Takeover Offers in a Manner Which Differs From That Adopted in the Williams Act, States Have an Inherent Power to Accomplish Such Regulation.

Relations between state and federal governments have historically been typified by a notion of cooperative federalism in which the units are regarded as "mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand."[87] Indeed, the more recent trend of this Court has been a careful approach to maintaining the diversity between state and federal regulation wherever possible, as will be developed below. This Court has ruled that federal preemption occurs whenever a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[88] However, as a prerequisite to preemption analysis it is necessary to ascertain a congressional intent to preemptively occupy the

[86]U.S. CONST. art. vi, cl. 2.

[87]Wright, *The Advisory Commission on Intergovernmental Relations: Unique Features and Policy Orientation*, 25 PUB. AD. REV. 193, 199-200 n. 26 (1965).

[88]Hines v. Davidowitz, 312 U.S. 52, 67 (1941). It was this rationale that most attracted the district and circuit courts herein in finding preemption. (J.S. App. A-35, A-113.)

field or the existence of a true and irreconcilable conflict between state and federal law.[89] As stated by this Court:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.[90]

Addressing initially the concept of occupation of the field by congressional action, it is clear that occupation will *not* be found unless there is demonstrated a "clear and manifest purpose of Congress" that the subject matter be exclusively federally regulated.[91] Congressional preemptive purpose may be evidenced in several ways:[92]

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. [Citations omitted.] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [Citation omitted.] Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [Citations omitted.] Or the state policy may produce a result inconsistent with the objective of a federal statute. [Citation omitted.]

[89]Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141 (1963).

[90]*Id.* (*citing* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1959)).

[91]Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 146 (1963) (*citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[92]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Clearly, the Williams Act amendments to the Securities Exchange Act of 1934 do not constitute a "pervasive" scheme to regulate tender offers inasmuch as the law merely mandates the timing and content of disclosure.[93] Federal dominance can hardly be seriously contended due to the engrafting of the Williams Act onto the schema of the Securities Exchange Act of 1934 with its specific recognition, in Section 28(a) thereof,[94] of the right of nonconflicting state regulation,[95] as well as this Court's long standing recognition of the propriety and constitutionality of the coexistence of federal and state securities regulation.[96]

The object of the Williams Act is clearly and exclusively shareholder protection through disclosure so that informed tenders may be made,[97] yet federal requirements are minimal rather than all encompassing. Some contend that state corporate takeover laws are inimical to the purposes of the Williams Act based upon the fact that the Senate Report of congressional purpose indicates "extreme care to avoid

[93]Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 FORDHAM L. REV. 1, 29 (1976); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 214 (1977).

[94]15 U.S.C. § 78bb(a) (1970).

[95]For purposes of determining what constitutes a "conflict" in a section 28(a) context it is well to note that the SEC has interpreted the term narrowly as comprehending only state regulation making *impossible* a compliance with federal standards. *See, e.g.* SEC Investment Advisers Act Release No. 40 (Feb. 5, 1945), in 3 CCH FED. SEC. L. REP. ¶¶56,374-77, at 44,077-79; *id.* No. 8 (Dec. 12, 1940), in 3 CCH FED. SEC. L. REP. ¶¶ 56,420-21, at 44,086.

[96]Hall v. Geiger-Jones Co., 242 U.S. 539 (1917) (recognizing Ohio law); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917) (South Dakota); Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917) (Michigan blue sky law).

[97]Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975).

tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."[98] Their reasoning, however, implies that an object of the Williams Act was to sanctify the tender offer itself (and, arguably, because of the short time frame specified by the Williams Act, to sanctify the "Saturday night special") when, in fact, the Act's sole object was to "regulate tender offerors—not to confer new benefits upon them."[99] Those who have criticized state corporate takeover laws, because the delay time involved in them (as opposed to the short 7 to 10 day "Blitzkrieg" time periods allowed by the Williams Act) offers incumbent management of a target company additional opportunities to muster defenses to the takeover bid, reluctantly admit that the failure of the Williams Act to prevent the "Saturday night special" encourages panic selling and fails to provide an adequate time period during which target company management can honestly evaluate a tender offer and advise its shareholders.[100] There is, thus, no inconsistency between the state and

[98]SENATE COMM. ON BANKING AND CURRENCY, FULL DISCLOSURE OF CORPORATE EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS, S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).

[99]Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. REV., 872, 915 (1978). In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977), this Court noted:

> Congress was indeed committed to a policy of neutrality in contests for control, but its policy of evenhandedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors.

[100]E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 218 (1977). *See also* Robinson, *Tender Offers: Some Facts and Fancies, (Part 2)*, N.Y. L.J., May 18, 1976, at 1; Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 189 (1976).

federal laws inasmuch as both have as a primary purpose investor protection. Nor is the Williams Act identifiable with those comprehensive federal statutes designed to preempt such parallel state legislation as this Court criticized in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).[101] The Idaho law is not preempted under this analysis.

In yet another form of preemption analysis, this Court has first construed the relevant state and federal statutes to determine whether a true conflict exists.[102] In the principal case relating to the conflict doctrine of preemption, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960), a presumption of validity was applied to state statutes so as to leave vital state interests intact. Such a view is clearly supported by Alexander Hamilton's writings in *The Federalist*, where he states:

> It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty,

[101]The Court held: "It is the pervasive nature of the scheme of federal regulation * * * that leads us to conclude that there is preemption." Nor do Williams Act concerns lead to a "concomitant decrease in safety" that caused this Court concern regarding local laws affecting airline schedules. *Id.* at 639. *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L. J. 510, 519 n. 65 (1979); Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 248 (1977).

[102]Perez v. Campbell, 402 U.S. 637, 644 (1971). "Conflict" encompasses such other terms as "interference," "repugnance," "irreconcilability," "inconsistency," and words of similar impact. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 525.

> The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the states are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution.[103]

Though the decisions of this Court went through a period of time when one could argue that the state presumption had not only fallen into disrepute but had been replaced by a federal presumption,[104] recent cases reflect the more traditional solicitude of state interests in the Court's preemption inquiries. In *Goldstein v. California*, 412 U.S. 546 (1973), the Court emphatically protected the state's right to prohibit "pirated" recordings by narrowly construing the preemptive thrust of the Constitution's copyright clause. Utilizing Hamilton's concept of "constitutional repugnancy," the Court determined that exclusive federal power exists over "matters which are *necessarily* national in import."[105] Further—regarding "necessarily national" matters—those permissible situations where conflicts "may possibly arise" from concurrent state and federal regulation

[103]THE FEDERALIST, No. 32, at 200-01 (New American Lib. ed. 1961), *quoted in* Farmers Educ. & Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 546 (1951) (Frankfurter, J., dissenting).

[104]In *Perez v. Campbell*, 402 U.S. 637, 652 (1971), the Court specifically overruled *Kesler v. Dep't. of Public Safety*, 369 U.S. 153 (1962) (in which the Court had ruled that conflicts bearing on peripheral concerns of a federal scheme were allowable under the supremacy clause, applying a balancing test) and reaffirmed the rule of *Hines v. Davidowitz*, 312 U.S. 52 (1941), that the supremacy clause invalidates any frustration of a pervasive federal law's full effectiveness.

[105]412 U.S. at 554 [emphasis in original].

are to be distinguished from those situations mandating federal preemption in which such conflicts "will necessarily arise."[106] By articulating a strongly state directed standard for measuring repugnancy (requiring "necessarily national" character and "necessary" conflict) this Court has brought into the conflict area a test akin to that applied in specific intent to preempt cases.[107]

In *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973), at issue was the alleged preemption of state work rules by a federal work incentive program relating to family aid under the Social Security Act. Though the state rules, implemented as part of a federal program, did not present the usual pattern of federal and state laws converging on a common subject, the Court relied upon the federal law's principle of cooperative federalism to build the state interest into a presumption against preemption,[108] noting:

> Where co-ordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.[109]

In *Dublino* the Court left no doubt about what was expected of Congress if federal preemption is intended:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the

[106] *Id.*

[107] *See* Note, *The Presumption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 640-41 (1975).

[108] 413 U.S. at 414 n. 9.

[109] 413 U.S. at 421.

> exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed.[110]

Again, as in *Goldstein*, the *Dublino* test for occupation of the field is synonymous with a specific intent requirement. The rationale of *Goldstein* and *Dublino* suits well the setting herein where Congress failed to provide for specific preemption of state law when it deliberately engrafted the Williams Act onto the Securities Exchange Act of 1934 (with its specific Section 28(a) recognition of state right to pass nonconflicting securities laws). Had Congress intended the preemptive result urged by Appellee and found by the courts below, it would and should have provided for it. At the time the Williams Act was passed the State of Virginia already had a state corporate takeover law.[111] By the time Congress considered its amendments to the Williams Act two other states had enacted takeover laws,[112] yet

[110] 413 U.S. at 423-24. As one author notes:

> To preempt where Congress is silent and has not in terms covered the field creates a gap in needed regulation and leaves the state powerless to fill it. * * * [F]ederal supremacy, always protectable by Congress, should not—despite regulatory pervasiveness, potential or peripheral conflict—constrict the Court's ability to protect important state interests. *Ware* suggests a general perspective on federalism suitable here. Rather than to protect interests and check incursions into the various governmental domains, the better conception has the Court promoting cooperation among them wherever possible.

Note, *The Presumption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 654 (1975). *Referring to* Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973).

[111] VA. CODE §§ 13.1-528 to -541 (1978) (effective Mar. 5, 1968). The Williams Act became effective July 28, 1968.

[112] OHIO REV. CODE ANN. § 1707.041 (Page 1978) (effective Oct. 9, 1969); NEV. REV. STAT. § 78.376 to .3778 (1973) (effective Mar. 4, 1969).

Congress chose not to include preemptive language in its 1970 revisions. Though the state law/federal law issue has been much discussed in the tender offer field, both by writers and litigators, Congress has not acted to preempt the field, nor is it apparently likely to.[113] Further support for Appellants' contention that no preemption exists is this Court's statement in *Dublino* that the concept of pervasiveness typified by *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 318 (1947), is outmoded in the context of current Congressional practice:

> The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem • • •.[114]

[113]The American Bar Association's Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee noted in 1976:

> Although it was apparent that the majority [of the subcommittee] favored federal preemption of state laws governing tender offers, the meeting was advised by one congressional staff member that the mood of Congress makes federal legislation preempting the existing state takeover statutes extremely unlikely.

Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 187 (1976). The Subcommittee noted that "there appears to be no directly relevant judicial authority supporting the claim that the state statutes are invalid. The attempt to draw support from allegedly analogous constitutional cases becomes both complex and strained." *Id.* at 191-92.

[114]413 U.S. at 415. *But cf.* City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973) (where local law was held to be preempted by "the pervasive nature of the scheme of federal regulation"). However, unlike the Federal Aviation Agency regulations there in issue, the Williams Act merely offers minimum disclosure standards for conducting cash tender offers and is in no way so "comprehensive" or "pervasive" that stricter state rules are necessarily inconsistent with federal policy.

In recent analysis of the "conflict" issue, the Court has, again, compellingly weighted state interests. At issue in *Kewanee Oil Co. v. Bicron*, 416 U.S. 470 (1974), was whether state trade secret law was preempted by federal patent law. Though the Court was ostensibly concerned with the fact of whether a conflict existed, substantial support for the resulting finding of no conflict came from a state-oriented balancing of interests and consideration of the mutually compatible objectives of the state and federal laws.[115] In the only recent securities law preemption case, *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973), the challenged state law survived an *admitted* conflict. There, the Court allowed the state to refuse to enforce a compulsory arbitration clause in an employment contract required under a New York Stock Exchange rule flowing from administrative authority delegated to it by federal securities law. Though it might be argued that the Court's decision turned in part on the semi-private nature of the federally-adopted rule, the decision certainly evidences a perspective toward accommodation of state interests. The Court might have avoided finding a conflict by holding that the N.Y.S.E. rules were not federal law within the meaning of the supremacy clause; it relied instead on conventional preemption analysis and upheld the conflicting state law, expressing its:

> . . . conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."[116]

[115]414 U.S. at 478-79.

[116]414 U.S. at 127, *quoting* Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963). *See also* the inference of cooperative pur-

Parallel state and federal regulation of subject matter in a context where more stringent state statutes were being applied was approved in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), wherein the Court noted that it had "sustained state statutes having objectives virtually identical to those of federal regulations,"[117] and held:

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.[118]

"Federal regulation by means of minimum standards" was not deemed per se indicative of preemption.[119] State regulation could stand so long as dual compliance was possible, no demonstrated need for national uniformity existed, and the state law dealt rationally with a legitimate state problem. The Idaho Corporate Take-Over Law in issue herein deals rationally with the legitimate state problem of protection of Idaho investors in corporations with a substantial nexus with Idaho who are required to make a sophisticated investment judgment whether to tender all or a part of their stock in the target corporation to the tender offeror. This usually does not involve a mere decision of whether or not to make an outright sale of securities—a relatively simple decision—but in a partial tender offer such as was involved herein, with the prospect of pro rata

pose gleaned from an expression of congressional intent not to preempt in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 332, 336 (1973).

[117]373 U.S. at 142 (citing cases).

[118]*Id.*

[119]373 U.S. at 145.

acceptance of shares tendered coupled with the decision to tender all or merely a portion of the shares owned, the shareholder will most likely remain an investor in the newly-structured corporation whose stock he owns. Though minimal disclosure, such is offered by the Williams Act, is better than no disclosure at all, the State of Idaho was within proper constitutional grounds under Supremacy Clause analysis in strengthening the disclosure provisions without facing preemption.

The circuit court below opined that *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), supported its contention that the Idaho law was preempted,[120] inasmuch as this Court had invalidated the challenged state law therein by applying the *Hines v. Davidowitz* standard regarding an obstacle to accomplishment and execution of full congressional purposes and objectives.[121] In *Jones*, however, congressional purpose and an express preemption provision[122] were clearly spelled out within the four corners of the federal regulatory scheme involved, unlike the situation herein where there is no express preemption and reference must be made to legislative history to determine the congressional purpose that is alleged to be frustrated.[123] Moreover, as the circuit court pointed out, state law was preempted by *Jones* only because "compliance with state law would automatically trigger federal enforcement action,"[124] yet there is no concomitant federal enforcement "triggered" by a compli-

[120]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1275 n. 39 (5th Cir. 1978) (J.S. App. A-36).

[121]312 U.S. 52, 67 (1941).

[122]Jones v. Rath Packing Co., 430 U.S. 519, 530-32, 543 (1977).

[123]*See* Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977).

[124]577 F.2d 1256, 1275 n. 39 (5th Cir. 1978) (J.S. App. A-36).

ance with the Idaho Corporate Take-Over Law. Surely, any compliance with the Idaho law would presage a cash tender offer which would concurrently require compliance with the federal Williams Act and its disclosure provisions, but such hardly presents a similar situation to that considered by this Court in *Jones*. The circuit court, too, appears to subscribe to the posture taken by some writers that Section 28(a) allowing nonconflicting state laws in the securities field does not apply to state takeover statutes.[125] Such a posture not only ascribes to Congress an unwarranted ignorance of the effect of their engraftment of the Williams Act onto the existing Securities Exchange Act of 1934, but also ignores a basic tenet of statutory construction which requires consideration of an original act and its amendments as but a single law.[126] There is simply no indication that Congress intended to treat tender offers uniquely compared to other portions of the 1934 Act, thus the standard of cooperative federal-state relations is applicable.

The fundamental flaw in the premise of both the district court[127] and circuit court[128] is that the purpose of the Williams Act is to maintain a balance of neutrality between the tender offeror and target management. That the premise is wrong is clear both from analysis of the legislative history of the Williams Act and from this Court's

[125] *Id.*

[126] F. McCaffrey, Statutory Construction 164-67 (1953). *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. J. 510, 519 n. 63 (1979).

[127] 439 F.Supp. 420, 437 (N.D. Tex. 1977), *aff'd*, 577 F.2d 1256 (5th Cir. 1978) (J.S. App. A-118).

[128] 577 F.2d 1256, 1279 (5th Cir. 1978) (J.S. App. A-45).

conclusion in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977), that the sole congressional purpose was investor protection.[129] Senate testimony by Securities and Exchange Commission Chairman Cohen,[130] quoted and emphasized in *Piper*[131] as well as statements by Sen. Williams of congressional desire to "require full and fair disclosure for the benefit of investors"[132] underscores the conclusion that the Williams Act leaves the relative strength of raider and target unchanged rather than striking a "carefully conceived balance."[133] One recent author, writing about state takeover laws, notes:

> Although it is true that Senator Williams sought "to *avoid* tipping the scales either in favor of management or in favor of the person making the takeover bids," * * *, there is a crucial distinction between a desire to "avoid tipping the scales" and a deliberate attempt to establish a "neutral" balance between the competing parties.[134]

[129] *See also* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975), in which this Court stated:

> [T]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualification and intentions of the offering party.

[130] *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 198 (1967) (testimony of SEC Chairman Cohen).

[131] 430 U.S. at 27-28.

[132] 113 Cong. Rec. 24,664 (1967) (remarks of Sen. Williams).

[133] Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Cas. W. Res. L. Rev. 722, 759-61 (1970).

[134] Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. Rev. 510, 522 n. 81 (1979).

The author continues:

> If Congress did create a careful balance in 1968, it has quite willingly altered it on several occasions. In 1970, Congress reduced the level of stock ownership that triggers § 13d of the Williams Act from 10% to 5%. * * * This alerts management to a potential tender offer at an earlier point in time. The Antitrust Improvements Act, 15 U.S.C. § 18a (1976), has further shifted the balance in favor of management. * * * In addition, the new schedule 14D-1, adopted by the SEC in August, 1977, makes disclosure by offerors more detailed than it had been previously.[135]

Added to this is the most recent announcement by the SEC of proposed new rules to govern the conduct of tender offers under the Williams Act. On 5 February 1979, the SEC released for consideration Proposed Rules and Schedule,[136] as authorized by the Williams Act,[137] for regulating certain conduct relating to tender offers. The proposed rules would, inter alia:

> require all tender offers to remain open for at least 30 business days and for at least ten business days after any increase by the [takeover] bidder in the offered consideration; provide withdrawal rights for shares deposited by investors during the first fifteen business days of an offer and an additional 10 business days in the event of a competing offer; and permit bidders to extend pro rata acceptance rights for

[135] *Id.*

[136] Securities and Exchange Commission Release Nos. 33-6022; 34-15548; IC-10575; File No. S7-770 dated Feb. 5, 1979 (17 C.F.R. Part 240). [Hereafter SEC Proposed Rules of 5 Feb. 1979.]

[137] At sections 14(d) and 14(e) thereof. 15 U.S.C. §§ 78n(d) & 78n(e).

> periods in excess of those required by Section 14 (d)(6).[138]

What "balance" there may have been no longer exists in the federal law, thus reinforcing the conclusion that investor protection is the singular purpose of the Williams Act—a purpose that underlies the parallel Idaho Corporate Take-Over Law at issue herein.

[138] SEC Proposed Rules of 5 Feb. 1979, at 7. In discussing "Proposed Rule 14e-1(a) which would require that any tender offer must remain open for at least thirty days from the date it is first published, sent or given to security holders," *id.* at 111, the Commission identified several factors which led to its proposal. Among these was the factor that:

> The Williams Act was intended to "correct the current gap in our securities laws . . ." by providing full disclosure in tender offers. The substantive provisions of that Act were intended to permit a security holder provided with full disclosure to make an investment decision in an unpressured manner. However, certain tender offer practices have developed which increase the likelihood of hasty decision making by security holders confronted with a tender offer. The pejorative terms for these tender offers are well known—"Blitzkreig" and "Saturday Night Special." Tender offers of an excessively short duration increase the likelihood for hasty, ill-considered decision making and the possibility for fraudulent, deceptive or manipulative acts or practices by a bidder and others. The problems engendered by these tender offers of excessively short duration also may have provided part of the stimulus for some of the 36 states which have enacted anti-takeover [sic.] statutes since 1968. To the extent this was a purpose of such legislation, the attempt to alleviate the problem was laudable, but has resulted in an inconsistent, overlapping and ofter [sic.] counterproductive pattern of regulation and in many instances may have tipped the carefully construed [sic.] balance between bidder and subject company envisioned by the Williams Act in favor of subject company. Accordingly, the Commission believes that a uniformly applied federal regulation would better serve the purposes and policies of the Williams Act, including the interests of investors.

SEC Proposed Rules of 5 Feb. 1979 at 111-12. Thus, the SEC appears begrudgingly to concede that state corporate takeover laws have benefitted the tender offer field, acting as a laboratory to point up defects in federal law, but now hopes to eliminate the effect of these state laws by executive agency fiat rather than by seeking

There simply appears to be no congressional interest in exclusive regulation of cash tender offers. That area of concern seems to be no more prominent than those of traditional federal-state cooperation in other aspects of the securities market in general and the regulation of corporations. Though arguments such as a national marketplace concept, irrelevance of local conditions, and the *possibility* of conflicting or discriminatory local legislation[139] have been raised in support of national regulation of these fields,[140] they remain in the federal-state cooperative sphere. Nor does this Court appear willing (nor should it) to "federalize" corporate law in the securities field, for it announced in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479-80 (1977):

> Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. [Citation omitted] * * * There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of [federal law] to "cover the corporate universe."

State law *does* impose high fiduciary standards on corporate officers and directors,[141] and these apply in the takeover context. A New York state court has ruled that management conduct in obtaining a temporary restraining order against a hostile tender offer was a breach of fiduciary responsibilities which have traditionally been imposed by the states.[142] So, too, may Idaho indulge in the presumption that corporate officials subject to its jurisdiction will be faithful to their fiduciary responsibilities in a similar context. As will be developed below, there are numerous "traditional" means of delay or diversion which manage-

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express congressional action to preempt. The Idaho Appellants contend that there is more that the federal government can and should learn from the state law "laboratory" before any express preemption action is taken—which action is in the province of Congress, not the SEC.

[139]It is well settled law that this Court will not speculate on possibilities of hypothetical situations in its preemption analysis:

> In this as in other areas of coincident state and federal regulation, the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists."

Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45 (1966); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 130 (1978).

[140]Nader, *The Case for Federal Chartering*, in CORPORATE POWER IN AMERICA 67, 79-84 (R. Nader & M. Green eds. 1973). *See also* Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. REV. 872, 911 (1978).

A Colorado state law relating to inspection of shareholder lists (COLO. REV. STAT. § 3-15-17) was challenged as preempted by its incompatibility with SEC Rule 14a-7. In *Wood, Walker & Co. v. Evans*, 300 F.Supp. 171 (D. Colo. 1969), *aff'd*, 461 F.2d 852 (10th Cir. 1972), the courts held that the two provisions were not mutually exclusive, that utilization of the federal procedures did not constitute a binding election, and that the federal rule did not preempt the state statute.

[141]The high fiduciary duties have been recognized by federal courts as well, and such responsibilities are particularly applicable in the tender offer context, for as the United States Court of Appeals for the Second Circuit noted:

> Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. [Citation omitted.] By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control.

Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 364 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). *See also the cited case* Swanson v. American Consumer Industries, Inc., 415 F.2d 1326 (7th Cir. 1969).

[142]Reeves v. Texas Gulf, Inc., 78 Misc. 2d 579, 357 N.Y.S.2d 662 (Sup. Ct. 1974).

ment of a target company may invoke to resist a tender offeror. State takeover laws do not signal nor have they signaled the end of cash tender offers as a means for acquiring corporate control.[143]

V

THE IDAHO CORPORATE TAKE-OVER LAW DOES NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE[144]

A. In an Area Where State and Federal Laws Traditionally Coexist, Federal Courts May Not Weigh the Benefits of a State Corporate Takeover Law Against Its Alleged Effect on Interstate Commerce

The Williams Act represents congressional action in the field of securities regulation where state and federal regulation has for many years existed side by side.[145] Not only are the rights of states to regulate in the securities area long established, but the states also appear to have been the first so to regulate.[146] State "blue sky" securities legis-

[143]There were more tender offers in 1976 (132 offers) and 1977 (181 offers) than in any year since 1956 (the first year for which data is available. The 313 tender offers during 1976 and 1977 exceeded the total number of tender offers (269 offers) in the prior six years from 1970 to 1975. Austin, *Study Reveals Trends in Tactics, Premiums, Success Rates in Offers*, N.Y.L.J., June 12, 1978 at 25, col. 5. Dr. Austin concludes that:

> The implication is clear: tender offers continue to be an increasingly popular form of corporate takeover vehicle, and increased defensive strategies on the part of target corporations have not abated the increasing popularity of this type of corporate takeover vehicle.

Id. at 39, col. 2. There has not yet been a comprehensive study of any "chilling effect" state statutes may have had on tender offers.

[144]U.S. Const. art I, § 8, cl. 3.

[145]I L. Loss, Securities Regulation 28 (2d ed. 1961).

[146]In three early cases this Court ruled that state securities regulation did not violate the Fourteenth Amendment or unduly burden

lation withstands constitutional challenge because it promotes a legitimate state interest in attempting to assure that a state's citizens are not subjected to fraudulent securities transactions.[147] Thus, courts, in assessing the validity of state takeover laws should begin inquiry with the presumption that the historic police power of the states has been exercised in a constitutionally permissible manner.[148] Only when courts find that Congress has made no determination regarding the appropriateness of any state regulation in a particular field are those courts justified in applying a balancing analysis of the competing state and federal interests. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945), this Court held that:

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may * * * permit the states to regulate the commerce in a manner which would otherwise not be permissible.

Thus, "Congress may break [its] silence and permit state police laws to operate even where they involve interstate commerce in a matter of national concern."[149] In the securities field, Congress broke its silence by enactment of

interstate commerce. Merrick v. N.W. Halsey & Co., 242 U.S. 568 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917).

[147]Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Cas. W. Res. L. Rev. 722, 740 (1970).

[148]Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

It is improper for a court to act as a "super-legislature" by considering possible ulterior motives and weighing various interests assumed to be behind state laws:

> When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of the courts, but for the legislative body, on which rests the duty and responsibility of decision.

South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 191 (1938).

[149]Biklé, *The Silence of Congress*, 41 Harv. L. Rev. 200, 220 (1927).

section 28(a) of the Securities Exchange Act of 1934.[150] Though the circuit court below used legislative history of section 28(a)[151] to conclude that the state regulation allowed thereunder was solely that "of securities commissioners to regulate transactions *within their own borders*,"[152] such a limitation nowhere appears in the written text of section 28(a) or anywhere else in the 1934 Act. Recognizing that blue sky laws are designed to govern the sale of securities exclusively within one state, the ever widening scope of "interstate commerce"[153] makes it increasingly difficult to claim that *any* activity, particularly a securities transaction, is wholly intrastate and, thus, within the exclusive province of the states. Yet, Congress has made no attempt to limit state action in the securities field—and state corporate takeover laws provide no exception to this general satement. In both *Piper v. Chris-Craft Industries, Inc.*[154] and *Santa Fe Industries, Inc. v. Green*[155] this Court, absent a clear congressional mandate, emphasized its reluctance to federalize judicially areas of securities regulation law traditionally regulated by the states. Thus, a judicially imposed requirement that tender offers be solely regulated by federal law seems inappropriate. This is not to say that there do not exist cogent arguments for uniform

[150]15 U.S.C. § 78bb(a) (1970).

[151]H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933).

[152]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1281 (5th Cir. 1978).

[153]For example, in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 30 (1974), cotton to be delivered to a warehouse located in the same state as the farm upon which it was grown was held to be within interstate commerce because delivery to the warehouse where cotton was sorted and classified was essential for completion of what would eventually be an interstate transaction.

[154]430 U.S. 1 (1977).

[155]430 U.S. 462 (1977).

federal rules of securities regulation with express federal preemption,[156] or even that the entire field of corporation laws should be federalized.[157] The decision should rest, however, with Congress, not with the courts.

A commerce clause challenge to Arkansas' full-crew train laws, in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co.*, 393 U.S. 129 (1968), was met by this Court's reference to its 1966 decision in a case of the same name,[158] in which it held that congressional action referring the union-railroad dispute over required crew size to arbitration was not preemptive of state legislation, and upheld the state full-crew law on commerce clause grounds. This Court characterized its 1966 decision as holding that "Congress was aware of state full-crew laws and did not intend to override them,"[159] thus it could not be said that state laws placed an impermissible burden on interstate commerce. The Court reminded:

> As we have said many times, Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry.[160]

[156]Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L. J. 663, 698-99 (1974).

[157]*Id.* at 696-700; Note, *Federal Chartering of Corporations: A Proposal*, 61 Geo. L. J. 89, 90-98 (1972).

[158]Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 382 U.S. 423 (1966).

[159]393 U.S. at 134.

[160]393 U.S. at 144.

Reaching a contrary result would violate the balance of power between Congress, the States, and the federal courts, and this Court admonished:

> We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause.[161]

Unfortunately for appellants, the courts below have indulged in this same type of impermissible legislative judgment in determining that the Idaho Corporate Take-Over Law placed an undue burden on interstate commerce. In *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117 (1973), this Court followed its conclusion that state law was not federally preempted and quickly disposed of the Commerce Clause challenge by reference to several earlier cases for the proposition:

> What has been said above [about preemption] provides the answer to [the Commerce Clause] argument. It is in line with the principle, long established, that the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation.[162]

The principal consideration underscoring development of the foregoing cases is the paramount principle that federal courts must not indulge in the legislative function of weighing benefits of state regulation against purported burdens on interstate commerce in situations where Congress has expressed its intention that a particular field of regulation

[161] *Id.*

[162] 414 U.S. at 140.

is permissibly addressed by the states. There are practical reasons for such a conclusion as well as the legal ones. State legislation at once allows pursuit of important local interests and permits the states to function as laboratories in the federal-state system.[163] It is possible that the extended time periods for consummation of tender offers established in the 1976 Antitrust Improvements Act and announced recently by the SEC were shown to be valuable as a result of experience under state takeover laws which demonstrated that extended time periods did not chill use of tender offers or defeat their consummation. Regardless, it is important that federal courts not choke off an area of state regulation by engaging in that type of legislative balancing of interests which Congress has explicitly declined to employ.

Cases relied upon by the courts below for the proposition that a court should weigh benefits of local regulation against alleged burdens on interstate commerce are inapposite here because they all deal with situations in which Congress neither expressly nor impliedly authorized state legislation. For example, in *Pike v. Bruce Church, Inc.,* 397 U.S. 139 (1970), Congress never considered the problem of packaging cantaloupes for interstate shipment. In view of the total lack of congressional encouragement for the type of state statute involved, this Court was forced to balance the competing state and federal interests presented. The same is true of regulating of shrimp packing at issue in *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928). But, in the field of securities regulation, Congress

[163] *See* New State Ice Co. v. Liebman, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

has left to the states the concurrent right to regulate; the right is recognized historically, as well as specifically by section 28(a) of the Securities Exchange Act of 1934.

B. In Determining Whether a State Law Unduly Burdens Interstate Commerce, a Three-Step Analysis Is Employed

The criteria for determining the validity of state statutes which affect interstate commerce stem from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Commerce clause analysis typically involves complex federalism and statutory interpretation issues. The more recent trend of this Court's decisions indicates reluctance to find impermissible conflicts between the commerce clause and state laws, and, while a few state laws have been struck down,[164] yet others which clearly affected interstate commerce have been upheld.[165] The test recently applied by this

[164] *E.g.* City of Philadelphia v. New Jersey, 437 U.S. . ., 98 S.Ct. 2531 (1978) (New Jersey statute prohibiting importation of solid and liquid wastes violates commerce clause); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (Wisconsin law barring tandem vehicles over 55 feet long invalid under commerce clause); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (North Carolina statute prohibiting all apple grade designation other than applicable federal grade violates commerce clause).

[165] *E.g.* Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (Iowa single-factor sales formula for apportioning net income of interstate corporations—which could result in taxation of 100% of net income from products sold in Iowa but manufactured outside the state—does not violate commerce clause); Exxon Corp. v. Maryland, 437 U.S. 117 (1978) (upholding Maryland statute prohibiting producers or refiners of petroleum products from operating service stations in state).

Court in commerce clause cases requires a balancing of legitimate state interests served by the challenged local law against that law's impact on interstate commerce.[166] If a state law substantially impedes the free flow of commerce between the states or affects an area of commerce that *requires* national uniformity, it will generally be found to violate the commerce clause.[167] Under *Pike* the Court made it clear that a state law affecting or regulating interstate commerce will be upheld so long as it accomplishes a legitimate state interest and if the burden imposed on commerce does not outweigh the putative local benefits of the state law.[168] The extent of the burden that will be tolerated depends, in part, upon whether the local interest could be as well promoted with a lesser impact on interstate commerce.[169]

1. The Idaho Corporate Take-Over Law Promotes a Legitimate Local Interest

The primary local interest promoted by the Idaho Corporate Take-Over Law is protection of investors in corporations which are incorporated within or substantially

[166] In *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1976), the Court stated that commerce clause inquiry "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *See also* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 371-72 (1976) (when a statute promoting a legitimate state interest also burdens interstate commerce Court "is confronted with a problem of balance").

[167] Southern Pac. Co. v. Arizona, 325 U.S. 761, 767 (1945).

[168] 362 U.S. at 142. *See also* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443-44 (1960).

[169] *Id.*

related to the State of Idaho. Both courts below have denigrated this interest of the State of Idaho,[170] thus causing Idaho to "lose the entire commerce clause battle in the initial skirmish."[171] The degree of delay occasioned by the Idaho law (with its elimination of the possibility of a "Saturday night special"), the additional disclosure to shareholders, and protection of investors from fraud as well as their own imprudence in too hastily accepting the invitation to tender some or all of their securities in the target company, coupled with state regulatory involvement all coalesce to protect investors. Moreover, these same considerations supply a marked degree of protection of creditors and employees of the target company as well as of the corporate entity itself.[172]

[170]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1283, 1285 (5th Cir. 1978) (J.S. App. A-53, A-59); Great Western United Corp. v. Kidwell, 439 F.Supp. 420, 437-38 (N.D. Tex. 1977) (J.S. App. A-121 - A-123).

[171]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U.L. REV. 872, 921 (1978).

[172]Certainly it cannot be claimed that state interest in promotion of employment and management opportunities within Idaho and protection against an adverse economic effect on Idaho business—a collateral effect of the Idaho Corporate Take-Over Law—is a somehow illegitimate exercise of the police power to protect a local public interest. That protection of such legitimate local interests incidentally happens to benefit target company management due to the delay factor state laws inject into the tender offer process is of little consequence—particularly now that both Congress (in certain antitrust contexts) and the SEC (in takeovers generally) are acting to insert delay factors into the federal law schema.

The absence of an administrative forum under the Williams Act has caused target companies, where no state law governed, to resort to the courts, and federal courts have been willing in several cases to grant injunctions for consideration of the effects of a tender offer on a target corporation's customers, suppliers, and employees—as well as the interests of the target company shareholders. *See, e.g.* Elco Co. v. Microdot, 360 F.Supp. 741 (D. Del. 1973) *and* Boyertown Burial Casket Co. v. Amdeco, Inc., 407 F.Supp. 811 (E.D. Pa. 1976) [customers, shareholders & employees]; Gulf & Western Industries, Inc. v. Great Atl. & Pac. Tea Co., 476 F.2d 687 (2d Cir. 1973) [target company shareholders].

The purpose of investor protection also underlies state blue sky laws and has long been recognized as a legitimate state interest.[173] Although takeover laws, including Idaho's, have a more broad scope than blue sky laws they are nonetheless based primarily on a legitimate local interest in protecting local investors. That the takeover laws have an extraterritorial reach is a necessary concommitant of meaningful protection of domestic investors, as will be developed at length below. State police power to provide state regulation of a myriad of activities to protect the health and welfare of state residents forms the foundation of this investor protection. Thus, unlike the singular purpose of the *Pike* statute, the Idaho Corporate Take-Over Law serves multiple ends.

The inquiry as to whether the State of Idaho has a legitimate interest in investor protection (and, collaterally, in protection of creditors and employees of a target company and its corporate entity):

> under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation are reasonably adapted to the end sought.[174]

Courts may not sit as legislatures, state or national, to debate the wisdom of state laws which may place an incidental burden on interstate commerce:

[173]I L. LOSS, SECURITIES REGULATION 23 ff. (2d ed. 1961); Hall v. Geiger-Jones, 242 U.S. 539 (1917).

[174]South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 190 (1938).

> It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment.[175]

There is uncontradicted evidence in the record herein that the challenged Idaho law does not *prevent* takeovers of corporations with substantial Idaho connections.[176] Appellee's own witness testified that state takeover laws are designed to give shareholders enough time "to determine whether or not they will tender" their stock.[177] The Idaho law protects shareholders by affording the Director of the

[175] *Id.* at 191. *See also* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 393 U.S. 129, 138-39 (1968). *See generally* Bickle, *Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924).

[176] Testimony of Mr. Bartell (Trial Tr., 65) (A. 198); Testimony of Mr. Wheat (Trial Tr., 250) (A. 262-263).

To claim that delay defeats tender offers is to use a tired, disproven maxim. *See, e.g.* Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U. L. REV. 991, 994-95 (1973). Quite to the contrary, delay frequently benefits shareholders by encouraging an auction market for target company stock. *See* Robinson, *Directors Under Attack in New 'Bear Hug' Mergers*, N.Y.L.J., June 12, 1978, at 25, col. 1, 41, col. 1. A leading practitioner in the tender offer field commented:

> There is a question of utility [of the takeover] under the various state takeover laws. Do they, in effect, destroy the value of the takeover as a corporate tool? I think the answer • • • is no. What the state takeover laws do, by and large, is merely provide for delay. The delay will mean that you are not going to get quite the same bargain you might otherwise have gotten on a short-fuse tender or so-called "Saturday night special." But • • • once you put your offer on the table • • • the ball is in play and *that* [*target*] *company will go somewhere.* Then it is a bidding match and you have your opportunity to bid. So, to that extent, it is still a very useful tool.

Flom, *The Role of the Takeover in the American Economy*, 32 BUS. LAW. 1299, 1299 (1977) (emphasis supplied).

[177] Testimony of Mr. Bartell (Trial Tr., 88) (A. 214-215).

Department of Finance opportunity to review takeover filings, by allowing the target company board of directors to exercise its fiduciary responsibilities, and by giving shareholders additional time and information with which to make informed investment decisions, with the result that rationality of negotiation may be restored to the heretofore rapid-fire tender offer transaction. The Idaho law applies equally to Idaho and out-of-state offerors, thus it does not discriminate in favor of Idaho residents and against residents of other jurisdictions. Regulation turns on the relationship of the target company to the State of Idaho, thus cases such as *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), are inapposite. Nor does the Idaho law require something to be done in Idaho that could more efficiently be done elsewhere, thus making cases such as *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), and even *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), likewise inapposite.

Though the additional delay occasioned by state takeover laws such as Idaho's has been criticized, one of Appellee's own witnesses testified that under state law "the price that has been paid for the shares has almost always gone up so that the shareholders received a greater consideration for their shares in connection with takeovers that ultimately were consummated."[178] One of Appellants' witnesses underscored the reason for such a result:

> The problem, really, involved here is that takeovers are basically an economic opportunity, and only economic opportunists participate. • • • The object is to buy something as cheaply as you can and as fast as

[178] Testimony of Mr. Bartell (Trial Tr., 84) (A. 212).

you can and get away as quickly as you can before somebody else smells what the game is about and can join in and throw another bid into the pot.

The net result is that, obviously, the shorter the tender period, the more opportunity for success for the original offeror.[179]

Further uncontradicted evidence reveals that infirmities of the marketplace have caused shares in many corporations to be undervalued, often sufficiently so as to make the company vulnerable to takeover bids at bargain prices.[180] It is in this arena of high stakes gambling for corporate control that shareholders need the ability to make considered, informed judgments about what *they* should do with *their* target company shares.

A tender offeror may use the approach of Appellee herein and make a "bear hug" un-negotiated takeover proposal to target company management, hoping to effect an uncomplicated takeover and, under state laws like Idaho's, avoid the necessity of compliance with a state corporate takeover law.[181] If target company management rejects the friendly offer the next step (as occurred herein) is to make a subsequent public offer at a lower price, thereby foreclosing shareholder opportunity to consider the higher price and proposal that was offered solely for management consideration. As one author notes:

[179]Testimony of Mr. Chatlos (Trial Tr., 335-36) (A. 284-85).

[180]Testimony of Mr. Chatlos (Trial Tr., 336-37) (A. 285-86).

[181]IDAHO CODE § 30-1501(5)(e) (Supp. 1978). The theory underlying this exemption is that target company management is under a fiduciary duty to shareholders to act in their best interests and that it is not necessary for a state to apply a governmental overlay to action already governed by high legal standards.

The strategem of dropping an initial tender price is occasionally employed to incite shareholder pressure on management, or at least to instill in management the fear of shareholder suits. But in the majority of cases in which tender offers have been delayed due to state hearings, shareholders have received more than the original offer price, primarily as a result of competitive bidding.[182]

[182]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. Rev. 872, 925 (1978). Examples of the beneficial effect of delay and of takeover battles in five actual situations has been illustrated in *The Great Takeover Binge*, BUSINESS WEEK, Nov. 14, 1977, at 176 (reproduced below):

What takeover battles do to stock prices

	Winning Bidder	Losing Bidder
1.	Racal Communications	Applied Digital Data Systems
2.	J. Ray McDermott	United Technologies
3.	Norton Simon	Fuqua Industries
4.	Allegheny Ludlum Industries	Crane
5.	Northwest Industries	MCA

Target Company	Price of Target Before Bidding	Initial Bid	Winning Bid	Price-Earnings Multiple of Winning Bid	
Milgo Electronic	19⅛	28½	36	28	1.
Babcock & Wilcox	34¾	42	65	15	2.
Avis	14	15½	22	9	3.
Chemetron	30½	40	55	30	4.
Coca-Cola Bottling of L.A.	21¾	30	40	16	5.

Data: First Boston Corporation

Recently, as an exhibit in unsuccessful litigation involving a shareholder challenge to the high price Kennecott paid for Carborundum, a study by First Boston Corp. on premiums paid in

Though one may speculate about the use of various strategems by tender offerors there is no cause to conclude that any effect of the operation or existence of state corporate takeover laws acts to the detriment of those persons state law (as well as the Williams Act) was designed to protect. In fact, the corporate auction process fostered by state laws has resulted in premiums for shareholders amounting to

1977 in cash tender offers was introduced. A portion of that Exhibit reveals:

Exhibit

Premiums and multiples paid in selected 1977 cash tender offers

	Premium Over Price Prior to Announcement			Offer as Multiple of		Number of
	One Day	One Week	Four Weeks	Net Income	Book Value	Transactions
For all offers						
Average	57.5%	66.3%	73.7%	15.9x	1.7x	23
Median	54.6	66.2	67.6	14.3	1.7	
For friendly offers						
Average	58.1	65.8	74.9	15.9	1.8	18
Median	54.0	63.4	74.9	15.3	1.8	
For unfriendly offers						
Average	60.6	69.3	72.0	16.6	1.5	4
Median	66.2	66.2	68.8	13.9	1.5	
For offers after competing bids						
Average	73.0	78.5	91.1	17.6	1.9	8
Median	73.5	76.6	93.2	15.3	1.8	

Source: First Boston Corporation

Reproduced in Chatlos, *The SEC vs. investors on tender offers,* in Ideas for Action, HARV. BUS. REV. 6, 7 (Sept.-Oct. 1978).

As pointed out by an expert in the field of tender offers whose firm represents both offeror and target:

> A perusal of these [First Boston] figures provides ample evidence of evaluations by hard-headed corporate executives as opposed to the price structure in the malfunctioning marketplace. In those instances involving four weeks or longer, which by corporate standards provide a reasonable opportunity for accumulation and evaluation of facts, the business community saw fit to make bids that averaged an astonishing 91.1% over market price and reflected an average of 17.6 times earnings and 1.9 times book value. While some modest premium could be attributed to the satisfaction of managerial egos or the expected synergism of melded assets, such considerations could scarcely account for these figures.

Id.

hundreds of millions of dollars over the original bids.[183] Any real or threatened detriment to a tender offeror is not only speculative but also outside the scope of both state and federal law purposes in tender offer regulation.

Another challenge to the purpose of state takeover laws, such as Idaho's, has been that the delay factor occasioned by such laws provides target company management opportunity to make defensive moves in an attempt to defeat the takeover bid. Such analysis smacks of a defense of the "Saturday night special" as a rule of law, and is vulnerable on several grounds. First, any initial "balance" created in 1968 in the Williams Act was shifted by the 1970 amendments thereto which lowered the threshold level of acquisition of shares which triggers the Act's applicability from 10% to 5%, thus giving target company management information that a takeover attempt was occurring before a substantial amount of stock had already been acquired (and effective control may in some instances nearly have been achieved. Next, the 1976 Antitrust Improvements Act acted in larger transactions to inject a delay period longer than that provided in the Williams Act. Finally, recent

[183] In a study of contested tender offers by the leading proxy solicitation and investor firm of Georgeson and Co. from November 1974 through 1976:

> we found that in 20 offers a total premium of $186 million over the original bids accrued for the benefit of investors as a result of the corporate auction process fostered by the state restraints. On the other hand, during these 26 months only 2 competitive offers were completed in seven days or less, involving a premium of approximately $7 million. Through June 1978, the accumulative premium to stockholders was well in excess of $1.1 billion over the original bid, *thanks to the state laws.*

Chatlos, *The SEC vs. investors on tender offers* in Ideas for Action, HARV. BUS. REV. 6, 7 (Sept.-Oct. 1978) (emphasis supplied). *See also* Testimony of Mr. Chatlos. (Trial Tr., 374) (A. 288-89).

SEC proposals for a 30 day delay period in takeover bids has further shifted the balance between raider and target. Yet, it is clear that the intent and effect of each change is synonymous with the underlying purpose of both the Williams Act and the Idaho Corporate Takeover Law—investor protection.

If target company management intends to breach its fiduciary duties, state takeover laws do not provide an exclusive vehicle. Target company management has a number of "defensive" tactics other than the delay factors of state takeover laws available for use in attempting to thwart takeover bids. In fact, one text has been written devoted exclusively to that subject.[184] The defensive maneuvers, exclusive of state takeover laws, suggested for the use of target company management include: charter and by-law amendments to assure continuity of management by making it more difficult to replace directors and to establish provisions to protect "minority" shareholders (often known as "shark repellent" clauses); adoption of "supermajority" voting provisions for transactions between the target and an "interested shareholder" (usually one who holds a certain percentage of stock); deterrence by developing or acquiring business operations subject to governmental regulation of changes in their ownership or control; once the identity of the actual or potential tender offeror is known, the target may acquire a company in a

[184]A. Fleischer, Tender Offers: Defenses, Responses, and Planning (1978). Chapters in other texts have been devoted to the same defensive maneuvers. *See, e.g.* E. Aranow & H. Einhorn, Tender Offers for Corporate Control, Ch. 9 (1973); E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control, Ch. 4 (1977); 1 M. Lipton & E. Steinberger, Takeovers and Freezeouts, Ch. 6 (1978).

competing or related industry and seek protection under the antitrust laws; transfer of target company stock into "friendly" hands; make the target less attractive by utilizing surplus cash: to acquire a business, retire debt, repurchase outstanding stock, or increase its dividend; press releases or other communications to shareholders attacking the offer and emphasizing its deficiencies; litigate: particularly through use of antitrust challenges, suits to challenge deficiencies or failure to comply with federal disclosure laws, challenging questionable payment disclosures in SEC filings; securing a better offer from either the original bidder or a "white knight;" other by-law or charter amendments to create staggered boards of directors, elimination of cumulative voting, sale of a small class of preferred stock to "friendly" shareholders whose approval is needed before any merger or sale of assets proposal may be accepted, establishment of a maximum number of directors (usually equal to or just greater than the number currently elected to direct the corporation), limit the ability of shareholders to remove directors in advance of expiration of their terms, selection of "stand-by" directors to fill any vacancies that may occur during tenure of the existing board of directors; establishment of formulas for determining the minimum price at which minority shareholders may be bought out or squeezed out by a shareholder who acquires control; establishment of an employee stock ownership plan; announcement of a stock split; concentrated selling of the tender offeror's shares by friendly third parties to decrease market value of any securities being offered in exchange for tendered shares; insertion of control clauses in loan agreements and long-term employment

contracts. The introduction of state corporate takeover laws into the tender offer scene does not provide target company management with some new and exclusive "tool" to use to attempt to defeat tenders. The state laws provide significant legitimate shareholder protection; that they may be used or abused by non-beneficiaries is immaterial.

The state corporate takeover laws do nothing more than bring the tender offer closer to the more common techniques by which corporate ownership and control are transferred, such as mergers, exchange offers, sales of assets, and sales of controlling blocks of stock. In fact, as will be developed more fully below in discussing burden on commerce, state regulation of tender offers, side by side with federal regulation, is strikingly similar to the procedures extant in proxy contests. All these techniques are consummated through a process of deliberation and negotiation, with the interests of shareholders primarily safeguarded by state law and normal market processes. One might well ask why, if delay and disclosure are advantageous to the shareholder in *all other* types of change in corporate control, delay and added disclosure are considered improper in the tender offer context.

Testimony of former SEC Commissioner Wheat described how state takeover laws protect what, in effect, becomes a new, second market in securities of a target company during a tender offer bid:

> First of all, there is the general trading market for the securities of the target company and the market will, of course, react to a takeover bid. * * * And if under the Williams Act, for example, a bidder can ram through swiftly a tender offer before there is an opportunity to bring into that market for that controlling block [of shares] other potential bidders who may be very much interested, but who obviously take a little longer to gear up and have a look at the situation, then you do not have a good market because you have by definition failed to bring together those who are or have an interest in buying to [sic.] those who have an interest in selling. To that extent and in that limited context, the state tender offer statutes provide a better market.[185]

Certain other interests which underlie the Idaho Corporate Take-Over Law are particularly applicable to corporations, such as the target company herein, which have their principal place of business and substantial assets in Idaho. Modern corporations have a significant impact upon the communities in which they are located, not only in economic but also in social terms. A corporation can influence significantly local lifestyle and tone, particularly in large cities, both affirmatively (*e.g.* by commitment to charitable and civic affairs) and negatively (*e.g.* by lack of commitment to pollution control or occupational safety and health). A state, such as Idaho, which affords to corporations physically located in its boundaries innumerable privileges and protections as a matter of well settled corporate law, has a legitimate interest in ensuring that changes in corporate control result from the exercise of informed, considered judgment exercised by the shareholders of a target company either as a result of state takeover law protections or through exercise of fiduciary responsibilities by corporate management. Though the same economic rationale does not apply to a corporation merely

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[185]Testimony of Mr. Wheat (Trial Tr., 305-07) (A. 275-76).

chartered in Idaho, with offices and assets elsewhere, traditional concepts surrounding the right of the state of incorporation to regulate domestic corporations, coupled with the overriding domestic shareholder protection concerns, justify the applicability of state takeover laws.

With respect to tender offer bids, the regulatory methods embodied in the challenged Idaho law—waiting period, disclosure, and standards of substantive fairness—are well accepted means of shareholder protection which in other contexts have not stifled sales of securities, takeovers by proxy fights, or capture of control through an exchange offer. The Idaho Corporate Take-Over Law is a logical extension of the minimal requirements of the Williams Act, the Securities Exchange Act of 1934, and the SEC's proxy rules.[186]

2. The Extraterritorial Reach of the Idaho Corporate Take-Over Law is a Necessary Incident of the Goal of Achieving Effective Shareholder Protection.

The linchpin of constitutional challenges to state corporate takeover laws, and Idaho law provides no exception, is that the laws attempt to apply not only to target company shareholders within the regulating state, but nationally (or globally) as well. If this be so, the challenge is truly not to the *effect* of extraterritorial reach—for all state regulation of commerce is extraterritorial to some extent because it inevitably affects interests operating both inside and outside the state—but to the *scope* of that reach.

[186]*See* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CAS. W. RES. L. REV. 722, 758 (1970).

Unquestionably, effective regulation of takeover bids depends on regulatory statutes having extraterritorial scope so as to affect all shareholders of a target company. If the regulating state could merely govern in-state transactions the tender offeror could avoid regulation by all but the most populous states (or states with the highest degree of stock exchange trading) by refusing to solicit the in-state shareholders of the state whose takeover law it sought to avoid. There is simply no alternative form of regulation of corporate takeovers, less global in reach and less arguably "burdensome" on interstate commerce which effectively could serve legitimate state interests in shareholder protection under a tender offer.

As earlier noted, the broad reach of the concept of "interstate commerce" in modern times makes it well nigh impossible to claim that any activity is wholly intrastate.[187] Securities transactions are no exception. The Idaho Corporate Take-Over Law covers *only* companies with a nexus to the state of a type which supports internal affairs regulation—regulation involving "the relationships *inter sese* of the corporation, its directors, officers, and stockholders"[188]—which Idaho may reasonably regulate on a nation-wide basis. That a takeover bid is essentially an internal affairs matter underlies an implicit premise of the viability of the Idaho law.

Where a tender offer is directed toward a corporation incorporated in Idaho the internal affairs doctrine appears

[187]*See, e.g.* Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

[188]Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Scope of Full Faith and Credit*, 58 COLUM. L. REV. 1118, 1124 (1958).

readily applicable.[189] The desirability of uniform resolution of such internal affairs matters of corporate life such as "shareholders liability, validity of stock issues, ability to merge and effect other organic changes, election of directors, voting trusts and voting agreements, dividends, relative rights of shareholders, and duties of officers, directors, and controlling shareholders to the corporation and to shareholders"[190] causes courts almost without exception to decide such questions by applying the law of the incorporating state, "regardless of where the operative acts occurred."[191]

Before delving more deeply into the internal affairs concept, it is well to underscore what is involved in a cash tender offer. Contrary to the suggestion of the circuit court below, a tender offer *is not* a mere "sale of securities from one shareholder to another [without] a change in the corporation itself,"[192] nor is it a mere aggregate of nu-

[189]*See* Latty, *Pseudo-Foreign Corporation*, 65 YALE L. J. 137, 138-43 (1955) (listing eight justifications for governing an enterprise by the law of the state of incorporation—the charter as a contract, the corporation as a creature of the chartering state, certainty and ease of application, the difficulty of matching local law to foreign charters, conflict between local and foreign law, antiquated local laws, and lack of or improper local policies—and concluding that local policies outweigh these considerations so that the pseudo-foreign corporation should not be immunized from local laws).

[190]Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CAS. W. RES. L. REV. 722, 742 (1970).

[191]*Id.*

[192]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 n. 53 (5th Cir. 1978) (J.S. App. A-46).

Even the Senate Report on the Williams Act recognizes this fact:

> It has been argued that a cash tender offer is a straightforward business proposition which can be rejected or accepted by a shareholder like any other bid for his securities. But where no information is available about the persons seeking control, or their plans, the shareholder is forced to make a decision on the basis of a market price which reflects an evaluation of the company based on the assumption that that present management and its policies will continue.
>
> The persons seeking control, however, have information about themselves and their plans which, if known to investors, might substantially change the assumptions on which the market price is based.

SENATE COMM. ON BANKING & CURRENCY, FULL DISCLOSURE OF CORPORATE EQUITY OWNERSHIP AND IN CORPORATE TAKEOVER BIDS, S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967).

merous transactions in the securities of the target company. On the contrary, a tender offer is a mass securities exchange transaction in which corporate restucturing through transfer of control and ownership are effected, and a fiduciary relationship arises between the existing shareholders and the newly-controlling offeror. While one may claim that in a partial tender offer, such as was involved in this instant case, the entire transaction may be accomplished in a matter of minutes due to action of arbitrageurs in the national market for securities of the target company, there is no factual basis for such a claim. Both the Williams Act[193] and Idaho law[194] provide for taking up tendered shares on a pro rata basis in a partial tender offer which results in more than the desired number of shares being tendered. In such a case, target company shareholders, whether they make an informed decision to tender all or merely a portion of their shares, will in most instances remain shareholders of the target company even after the takeover is consummated.[195] Even in a tender

[193]Section 14(d)(6), 15 U.S.C. § 78n(d)(6) (1970).

[194]IDAHO CODE § 30-1506(3) (Supp. 1978).

[195]If the offer is successful, and unless they have divested themselves of all their shares in the target, the existing shareholders inevitably become minority interests of the target, subject to a new, untested controlling interest. The takeover involves a change in corporate control, a new board of directors, the establishment of a fiduciary relationship between the offeror and remaining share-

offer for *all* the outstanding shares of a target company, a shareholder must be allowed the opportunity of making an informed choice of whether to tender at all, or whether to tender all or a portion of his or her shares. Perhaps for the highly sophisticated arbitrageur a quick sale for a profit is the exclusive motivation for a tender of shares, but for every other target company shareholder (from the institutional investor to the "mom and pop" small shareholders) the ability to make an informed choice is of prime importance. Even Congress appears to have rejected the contention that a tender offer is simply a sale of securities.[196]

Congressional action in passing the Williams Act was strongly motivated by the resemblance of a cash tender offer to a proxy contest and the corresponding similarity between a decision to tender and "the decision made on an original purchase of a security."[197] Thus, the reliance of the circuit court below on the distinction between a tender offer and a proxy contest appears singularly misplaced.[198] As one writer notes:

> Both the proxy contest and the original issuance of securities are subject to joint regulation by the federal government and the state of incorporation under the internal affairs doctrine.[199]

holders, a dilution in voting power of the remaining shareholders, and, not infrequently, a subsequent merger into the offeror—all of which are traditionally embraced within the internal affairs doctrine. Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Cas. W. Res. L. Rev. 722, 744-45 (1970), *cited with approval in* Langevoort, *State Tender Offer Legislation: Interests, Effects, and Political Competency*, 62 Cornell L. Rev. 213, 221-22 (1977).

[196]Senate Comm. on Banking & Currency, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

[197]*Id.*

[198]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1280 n. 53 (5th Cir. 1978) (J.S. App. A-46).

In a proxy battle for mere ouster of incumbent management without change in corporate structure there is, of course, need for a careful balance of the rights of both the incumbents and the dissidents. While a need for procedures as equitable as practicable exists in the other type of proxy contest for acquisition of corporate control (which does not necessarily involve a "dumping" of incumbent management, particularly if that management is efficiently running the company) a need for a "delicate balance" between both sides of such an economically motivated transaction does not exist. In this type of proxy battle, the challengers are willing to take an economic risk in order to get control of the company. The cash tender offer as a device for acquisition of corporate control stands singularly alone, despite entry of the Williams Act into the scene. *Any other* mode of acquisition of corporate control involves the necessity of registering securities under the Securities Act of 1933 or of utilizing the proxy machinery of section 14 of the 1934 Act—all of which involve great delay and much disclosure.

In other modes of transfer of corporate control, such as in an exchange offer of shares of the offeror for shares of the target, there exists the possibility of regulation by a great number of states as a result of offering a security to shareholders in many states. In the exchange type of

[199]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. Rev. 872, 932 (1978); *See* Bresnick v. Home Title Guar. Co., 175 F.Supp. 723, 724-25 (S.D. N.Y. 1959) (state proxy regulation); L. Loss & E. Cowett, Blue Sky Law 30-42 (1958).

tender offer (as opposed to a cash tender), the offeror, unless its securities are registered on a national exchange, must comply with the securities laws of each and every state in which reside shareholders of the target company—and such compliance involves delay, the possibility of hearings, and the like, and is a well accepted part of securities law. To say that if a tender offeror elects to use cash there exists a thin line or "delicate balance" in conduct of the offer which state laws upset, but that an election to make a stock tender offer legitimately brings into play a panoply of state laws, is absurd. And, in the proxy contest, with its built-in delay and adversarial context—as with a cash tender offer—one may assume fairness by incumbent management toward shareholders as a result of state laws which impose high standards of fiduciary duty, and the underlying spectre of lawsuits for breach of that duty imposing personal liability for wrongfully-acting target company officials. Professor Shipman contends:

> • • • [A] takeover bid is so similar to classical internal affairs transactions that the state of incorporation has legislative jurisdiction to prescribe reasonable uniform regulation. [Tender offer] bids are by definition made by an incipient controlling person who under traditional common law doctrines will acquire, upon successful completion of the bid, a fiduciary relationship to the corporation and all of its securityholders.[200]

Though direct corporate action is lacking, there is mass common action in tendering by persons whose sole, and mutual, link is the target corporation, and their actions

[200]Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 CASE W. RES. L. REV. 722, 744 (1970) (*citing* Zahn v. Transamerica Corp., 162 F.2d 36 (3d Cir. 1947)).

will have a profound effect on the target, nontendering shareholders, and their own residual ownership of target shares. The effect of a successful tender offer bid on a tendering shareholder is akin to the effect resulting from a merger—a classic internal affairs transaction. It may also be argued that a tendering shareholder who remains after the tender as a target shareholder is also undertaking an action relating to the election of future directors and determination of future broad policy which will affect his remaining target securities. Thus, a tender offer is also a de facto proxy solicitation as well. In fact, the Letter of Transmittal to be used by tendering shareholders of Sunshine Mining Co. in submitting shares to Great Western United Corp. provided that the tender of shares included a tender of proxy.[201] Further support for the proxy contest analogy comes from the fact that when Congress passed the Williams Act it found that tender offer bids were functionally similar to proxy fights.[202] The Idaho Corporate Take-Over Law limits itself to regulatory practices that in similar contexts relating to internal affairs practices are widely used for shareholder protection.[203]

Certainly, many of the target corporations covered by the Idaho Corporate Take-Over Law, just as is Sunshine Mining Co. in this instant action (a Washington corpora-

[201]Idaho Defendants' Exhibit No. 3: Schedule 13D filed by Great Western United Corp. with Securities and Exchange Commission on March 21, 1977, pp. 1-3 of *Letter of Transmittal.*

[202]H.R. REP. No. 1711, 90th Cong., 2d Sess. (1968).

[203]Though a state shareholder protection statute which required a finding of fairness by a state official before approval of a merger of a domestic corporation introduced certain immobilities, such law appears to be permissible. SEC v. National Securities, Inc., 393 U.S. 453, 457, 460 (1969).

tion), will be "pseudo-foreign" corporations—those that are incorporated out-of-state but have most other significant contacts with the forum state.[204] With pseudo-foreign corporations, the forum state may generally apply its own law governing corporate affairs.[205] Though history suggests a preference for laws of the chartering state to govern internal corporate affairs, modern choice-of-law principles are sufficiently flexible to allow a balancing of competing state interests in determining applicable law to govern a particular transaction affecting corporate affairs.[206] A substantial body of case law demonstrates a judicial willingness to apply local law in lieu of chartering state law,[207] while states are becoming more aggressive in asserting legislative jurisdiction over local corporations regardless of their state of incorporation.[208] As businesses have expanded beyond state boundaries, the state of incorporation has become increasingly less relevant as a foundation for corporate regulation and may well have no greater significance than being the state wherein the incorporating papers have been filed.

Though assertion of jurisdiction due to the fact of incorporation in the forum state has a well established history "sanctified" by an impressive body of case law, basing application of corporate securities legislation on the cumulative tests of principal office and substantial assets ties the exercise of governmental regulatory power to corporations, pseudo-foreign in nature, that have a very real relationship with the forum state. The territorial breadth of forum state legislation under such conditions in no way

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[204] *See* Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 447 (1968); Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137 (1955).

A "pseudo-foreign" corporation has been defined as:

> [A] foreign corporation which [is authorized to transact business in the host state] and which engages in no substantial business activity in the state of its incorporation, and which by virtue of the place and character of its business is more closely identified with the business life of [the host state] than that of any other state.

Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporations Act*, 33 N.C. L REV. 26, 52-53 (1954) (*quoted in* Baraf. *The Foreign Corporation—A Problem in Choice-of-Law Doctrine*, 33 BROOKLYN L. REV. 219, 250 n. 130 (1967)).

Though the circuit court foreclosed any pseudo-foreign corporation analysis by its conclusory finding that its application was based upon having a certain percentage of target company shareholders in the host state, (577 F.2d at 1280 n. 53) (J.S. App. A-46), that conclusion is not supported by the authority the court cited (*citing* Western Air Lines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961)). *See* R. JENNINGS & H. MARSH, CASES AND MATERIALS ON SECURITIES REGULATION 1289 (4th ed. 1977):

> [T]he [*Western Air Lines*] court totally failed to give any guidance to the bar as to which of these factors [having its principal office in the host state, having a substantial portion of its revenues derived from business done in the host state, or having a large portion of its shares held by residents of the host state] were decisive or even significant.

[205] *Id.*

[206] RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 6(2) (1971).

[207] *See* Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317, 321-22, 327 (5th Cir.), *cert. denied*, 361 U.S. 885 (1959) (Delaware corporation subject to Louisiana statute in suit for fraud) Blazer v. Black, 196 F.2d 139, 146 (10th Cir. 1962) (president of Illinois corporation subject to Kansas statute defining cause of action for fraud); Western Air Lines Inc. v. Sobieski, 191 Cal. App. 2d 399, 411, 12 Cal. Rptr. 719, 727 (1961) (Delaware corporation subject to California mandatory cumulative voting); State ex rel. Weede v. Iowa S. Util. Co. of Del., 231 Iowa 784, 807-08, 2 N.W.2d 372, 384 (1942), *aff'd sub nom.* State v. Bechtel, 239 Iowa 1298, 31 N.W.2d 853 (1948), *cert. denied*, 337 U.S. 918 (1949) (Delaware public utilities corporation subject to Iowa statute in recapitalization scheme); German-American Coffee Co. v. Diehl, 216 N.Y. 57, 62-65, 109 N.E. 875, 876-77 (1915) (New Jersey corporation subject to New York regulation of dividend declaration).

[208] *See, e.g.* CAL. CORP. CODE § 2115 (West 1977 & Supp. 1978); N.Y. BUS. CORP. LAW §§ 1315-1320 (McKinney 1963).

impugns the legitimacy of the interest in protecting in-state shareholders.[209] Effective regulation of takeover bids for the protection of Idaho shareholders depends on the extraterritorial reach of the Idaho Corporate Take-Over Law; if Idaho could reach only in-state transactions, any potential offeror would avoid the State's regulation by simply refusing to solicit shareholders in Idaho. Though shareholders in Idaho "who wished to take advantage of an attractive offer, * * *, could sell their shares in the open market where the price of the target' shares will normally

[209]Should there be a reluctance on the part of Idaho to assert jurisdiction over a true "pseudo-foreign" corporation that, for some reason, had no shareholders in the state? For example, assume the extreme situation in which an out-of-state chartered target corporation had its principal corporate offices and 100% of its assets in Idaho, yet no Idaho shareholders. In such a situation management of the target represents, in its state law fiduciary capacity, *all* target company shareholders. Thus, Idaho has an interest in insuring that these fiduciaries perform their trust properly, and, in a sense, even though no shareholders physically live in Idaho, all shareholders are "present" in Idaho as a result of the actions management is obligated to take in their behalf. Idaho has a legitimate state interest in insuring that management actions are fairly taken based upon refined disclosure and ample time within which to give careful consideration to tender offeror proposals. *See* Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 364 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); Swanson v. American Consumer Industries, Inc., 415 F.2d 1326 (7th Cir. 1969). Idaho has a legitimate state interest in the business enterprise in the State of Idaho and in the representative capacity in which management in Idaho acts in behalf of shareholders of the target company wherever they are located; jurisdiction should, therefore, be asserted by Idaho over this hypothetical company.

Though the possibility of multi-state jurisdiction being asserted has been raised in this case, it never occurred and should not, thus, be speculated upon. In all likelihood comity principles would take care of any potential overlap, with states of potential jurisdiction deferring to the state determined among them to have the most significant relationship with the target and offer a high degree of shareholder protection. There is a long history of exceptional cooperation among states in the field of blue sky law administration, and there is no reason to assume that the same cooperation would not obtain regarding state tender offer regulation.

be trading at only a fraction less than the consideration offered by the tender bid,"[210] such appealing logic is overly simplistic and ignores advantages to shareholders of a direct tender. Under the Wiliams Act[211] and under the Idaho law[212] a shareholders who tenders directly to the tender offeror is entitled to any increased consideration offered before the offer's expiration. Under both laws, if during a specified period of time within the offer period something causes a directly tendering shareholder to change his mind and withdraw his tendered shares, he may do so without penalty or cost.[213] These opportunities are no longer available to the shareholder who sells on the open market "at only a fraction less"—plus broker fee—than the tender offer price. The advantages such a shareholder could have obtained through a direct tender will inure to the benefit of the one who purchased his stock—probably an arbitrageur. To accomplish the goal of protection of local shareholders the Idaho Corporate Take-Over Law *must* utilize an extraterritorial reach which, as a necessary incident to protection of domestic shareholders, confers the benefits of Idaho law on target company shareholders wherever they are located. Sans its extraterritorial scope domestic shareholder protection could well turn into in shareholder detriment, for purely local applicability of the law would make it a chimera as tender offerors avoided making offers in Idaho.

[210]E. Aranow & H. Einhorn, Tender Offers for Corporate Control 157 (1973).

[211]Section 14(d)(7), 15 U.S.C. § 78n(d)(7) (1970).

[212]Idaho Code § 30-1506(4) (Supp. 1978).

[213]Section 14(d)(5), 15 U.S.C. § 78n(d)(5) (1970); Idaho Code § 30-1506(2) (Supp. 1978).

3. The Idaho Corporate Take-Over Law Does Not Impose a Burden on Interstate Commerce Which is Clearly Excessive in Relation to the Local Benefits.

This final *Pike* criterion seeks to determine whether the burden challenged state legislation places on interstate commerce is clearly excessive compared to the putative local benefits, and generally derives its origin from *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945), in which the direct regulation of train lengths was held an unconstitutional burden on commerce since the prospect that each state might mandate different maximum lengths was potentially hazardous to interstate commerce, and the need for a uniform national system of railroad regulation outweighed any state interest in protecting the safety of its citizens. Though one author, who begins with the premise that state takeover laws are unconstitutional, then reaches the foregone conclusion, argues that *Southern Pacific* is analogous to the takeover law context, thus dispositive of the commerce clause issue,[214] quite the converse is true. Unlike railroad regulation, the need for "uniformity" in securities regulation is not compelling, and has not been since the earliest entry of federal law into the securities field.[215] Thus, there is little to distinguish the tender offer issue from commerce clause issues commonly raised by state blue sky laws. Further, state tender offer regulation does not discriminate against other states—in turn motivating

[214]Note, *Commerce Clause Limitations on State Regulation of Tender Offers,* 47 S. CAL. L. REV. 1133, 1161-62 (1974).

[215]The right of states to act in the securities field, as discussed above, exists historically quite independently of the federal recognition of state regulatory right in section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a) (1970).

them to retaliate against the regulating state, thus creating a "balkanization" result.[216] Moreover, *Southern Pacific* may lack doctrinal foundation in constitutional law[217] inasmuch as it appears that this Court has often applied an ad hoc balancing approach to commerce clause issues notwithstanding its reiteration of such concepts as "direct" and "indirect" burdens in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

Applying these commerce clause standards to the Idaho Corporate Take-Over Law reveals, first, that the law operates in a field (securities regulation) which does not now require and has never required national uniformity. Any "uniqueness" of the takeover law overlay onto already existing securities legislation has failed to prompt Congress to change the status quo of federal-state cooperative regulation into preemptive federal regulation. Previous analysis of the need for extraterritorial reach of state takeover laws forecloses the possibility of a state law with a lesser impact on interstate commerce if meaningful regulation of local shareholder interests is to be provided. The issue, thus, becomes one of determining the degree of balance between

[216]The "balkanization" concept suggests that if one state is allowed to erect "hostile economic barriers" inhibiting free trade with other states, those affected states will erect retaliatory barriers. *See* H.P. Hood & Sons v. DuMond, 336 U.S. 525, 537-39 (1949). This is absent in the context of takeover bids, for the states do not directly infringe on the interests of other states. When other states are forced to adopt their own corporate takeover laws in order to preserve their attractiveness as states of incorporation it is more a result of healthy competition than hostility between states.

[217]*Compare* Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) *and* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), *with* South Carolina State H'wy Dep't v. Barnwell Bros., 303 U.S. 177 (1938), *and* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 393 U.S. 129 (1968).

alleged burden on commerce and local benefit. The courts below identified one actual and several hypothetical effects of the Idaho law which would arguably burden interstate commerce.[218] The circuit court, however, discounted the speculative effects indulged in by the district court,[219] and relied heavily on the sole actual effect of the Idaho law—that its enforcement "*stopped* over 31 million dollars of interstate commerce."[220] This emphasis and reliance appears misplaced inasmuch as Great Western United Corp.'s tender offer was "stopped," and remained so, because of its failure and unwillingness to comply with the Idaho law after initially submitting to Idaho jurisdiction under that law. After receiving the Idaho comment letters and order to delay commencement of the tender offer[221] during the afternoon of Friday, March 25, 1977, GWU representatives made no attempt whatsoever to contact Idaho officials to attempt to negotiate or clarify requests for additional information. GWU's sole response to the Idaho request for additional information and order was the filing of this instant lawsuit at 9:00 A.M. on Monday, March 28, 1977. But under applicable commerce clause analysis the critical inquiry regards the costs and effects of *compliance* or attempts to comply with the challenged state law—not the obviously more burdensome effects of *noncompliance*. If the effects of noncompliance were not more burdensome than the effects of compliance there would be no economic

[218]Great Western United Corp. v. Kidwell, 577 F.2d 1256, 1283-84 (5th Cir. 1978) (J.S. App. A-54-A-55); Great Western United Corp. v. Kidwell, 439 F.Supp. 420, 438-39 (N.D. Tex. 1977) (J.S. App. A-124-A-125).

[219]577 F.2d at 1284, 1286 n. 59 (J.S. App. A-66, A61 n. 59).

[220]*Id.* at 1284 (J.S. App. A-55) (emphasis by the court).

[221]Plaintiff's Exhibits 4 & 5 (A. 77-87).

incentive to alter behavior. Though the circuit court noted that a GWU official testified that "the company doubted it could ever satisfy Idaho's requirements,"[222] GWU Executive Vice-President Boswell actually testified: "We just reached a determination that we might not ever be able to adequately respond to the [comment] letter."[223] Notwithstanding the subtle difference between what was actually said and how the court interpreted it, the fact remains that Mr. Boswell's conclusion is entitled to no evidentiary weight[224] inasmuch as GWU never even *attempted* to comply with Idaho's requests, and the question which prompted the response, as well as all other testimony, related to no direct inquiry of what specific requests would be difficult to meet. As one author cogently notes: "Indeed, if the effects of noncompliance were typically balanced against the bene-

[222]577 F.2d at 1284 (J.S. App. A-55).

[223]Testimony of Mr. Boswell (Trial Tr., 156).

[224]This same individual, G. Michael Boswell, is currently President and a Director of Sunshine Mining Co., the target company of GWU's takeover bid herein, and in such capacity, on the 1st day of January 1979, verified a Complaint in an action brought by Sunshine Mining Co. against Great Western United Corp., and others, in the District of Idaho alleging inter alia that GWU and the other defendants have defrauded Sunshine and its shareholders in connection with a settlement agreement that emerged from the initial takeover proposal which precipitated this instant litigation. Sunshine Mining Co. v. Hunt International Resources Corp., Great Western United Corp., Ivan L. Bielenberg & Western Investment Co., Civil Action No. CIV 78 1323 (U.S.D.C., D. Idaho 1979), First Amended Complaint at 2, 47. The essential thrust of the Sunshine complaint is that GWU and others made untrue and fraudulent representations in achieving a settlement of litigation in Idaho involving the proposed Sunshine takeover and have failed to live up to the terms of that agreement. The representation by Boswell as an officer of GWU that his company "might not ever" be able to comply with the requests in the Idaho comment letter is particularly suspect in light of Boswell's current posture as an officer of Sunshine that GWU made untrue representations and perpetrated fraud in connection with settlement of takeover litigation in Idaho.

fits of state regulation, it would be a rare state statute that survived the commerce clause test."[225]

Certainly the strong Idaho interest in shareholder protection more than outweighs the slight additional costs which GWU would have had to bear by compliance with the Idaho law. And these strong state interests should be upheld "even though the state action may have repercussions beyond state lines."[226]

VI

A TENDER OFFEROR DOES NOT HAVE STANDING UNDER THE WILLIAMS ACT TO CHALLENGE THE CONSTITUTIONALITY OF STATE CORPORATE TAKEOVER LAWS

Though this Court amply and at length reviewed the legislative history of the Williams Act in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), and concluded that a tender offeror suing in its capacity as a takeover bidder does not have standing to sue for damages, the Court left open for another day the question whether a tender offeror has

[225]Note, *The Constitutionality of State Takeover Statutes: A Response to* Great Western, 53 N.Y.U. L. Rev. 872, 923 (1978). Consider, for example, the full-crew cases in which this Court upheld against commerce clause challenges the right of states to prescribe minimum train crews for interstate railroads passing through the state. *See, e.g.* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co., 393 U.S. 129, 140-42 (1968); Missouri Pac. R.R. Co. v. Norwood, 283 U.S. 249, 254-56 (1931). Would the same result obtain if the Court had focused on the burden of noncompliance with the law—effective preclusion of the interstate railroad from the regulating state—rather than the burden of compliance—merely some additional expense to the railroad.

[226]Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950) (*quoting* Osborne v. Ozlin, 310 U.S. 53, 62 (1940)). The allowed activity in these cases involved commercial activity; certainly no less a standard should apply to governmental activity by state officials.

standing to sue under the Williams Act for injunctive relief.[227] The day may well have arrived.

Initially, it must be emphasized that GWU never really became a tender offeror or takeover bidder at the time it brought this instant action. The action was filed as a result of an order from an Idaho official effectively delaying the commencement of GWU's proposed tender offer. In this context, the dispute herein assumes overtones synonymous with the facts of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), in which this Court decided that a person who is not a purchaser or seller of securities, but is merely a potential purchaser or seller, does not have standing to bring an action under section 10(b) of the Securities Exchange Act of 1934 or SEC Rule 10b-5. Here, Great Western United Corp. was a potential tender offeror and takeover bidder, but at the time it filed suit was not an *actual* tender offeror or takeover bidder.

Moreover, as the Court's *Piper* analysis points out, the Williams Act was designed for shareholder protection, not to create a federally-protected right to make a takeover bid. Though GWU is a shareholder of the target company, Sunshine Mining Co., of the proposed takeover bid, it is not in that capacity that this instant action was brought.

Since the Williams Act is designed exclusively for shareholder protection, litigation under the Williams Act should be limited to that class of plaintiffs, and a potential or actual tender offeror or takeover bidder should not have standing to maintain an action under the Act's aegis.

[227]430 U.S. at 42 n. 28.

VII

WAYNE L. KIDWELL (NOW DAVID H. LEROY) SHOULD NOT BE DISMISSED AS A PARTY APPELLANT

Appellee correctly points out to the Court, as noted by the court of appeals,[228] that Idaho Attorney General Kidwell, though a party in the district court action, did not appeal. Were the circuit court decision not replete with references in the plural to Idaho "officials" and actions by the same, concluding by an affirmance of the decision of the district court below, the issue would seem foreclosed. Yet, as the circuit court saw fit to include the Idaho Attorney General in its appellate considerations and its decision without a formal appeal by him and to affirm a decision against him by the district court, it seemed only fitting, proper, and equitable for the Idaho Attorney General formally to appeal along with his co-defendant to this Court for ultimate resolution of this matter which has so long involved him even though he has acted throughout the course of the complained-of takeover activity in a wholly passive manner.

Accordingly, Appellants have taken the unusual measure of filing Notice of Appeal with both the United States Court of Appeals for the Fifth Circuit[229] and the United States District Court for the Northern District of Texas, Dallas Division.[230]

Since the jurisdictional issues herein, particularly, involve the Idaho Attorney General and his ability to administer Idaho law without the chilling spectre of being called to a host of out-of-state courts to defend the constitutional-

[228] 577 F.2d at 1261 n. 1 (J.S. App. A-2).
[229] (J.S. App. A-126-A-127).
[230] (J.S. App. A-128-A-129).

ity of Idaho laws, Appellant Idaho Attorney General Wayne L. Kidwell (now represented as a party by his successor in office David H. Leroy) should be retained as a party Appellant before this Court.

CONCLUSION

The judgments below by both the district court and circuit court of appeals should be reversed because:

1. Appellee did not have the requisite standing to bring this action;

2. Appellants were not subject to subject matter jurisdiction under section 27 of the Securities Exchange Act of 1934 through section 28(a) thereof;

3. Appellants were not subject to personal jurisdiction of the United States District for the Northern District of Texas;

4. Venue was improperly placed in the Northern District of Texas; and

5. The Idaho Corporate Take-Over Law is not unconstitutional inasmuch as it is not either:

(i) preempted by (under the Supremacy Clause), or

(ii) an undue burden on the Commerce Clause of the United States Constitution.

This case involves threshold issues which, if resolved in Appellants' favor, as they should be, could cause this Court to fail to reach the merits of the constitutional challenge to the state corporate takeover law. Appellants urge, however, that the issues of the merits herein are so inextricably intertwined with the jurisdictional issues that a disposition on jurisdictional grounds should include some indication of the role played by the merits. There is classic precedent

for such an action from *Marbury v. Madison*, 1 Cranch. (5 U.S.) 138 (1803). Moreover, though the constitutional issues on the merits of state takeover laws vis-a-vis federal law in the cash tender offer field have been written about by numerous authors, were the subject of the National Moot Court Competition in 1976, and have been the subject of a significant number of lawsuits prior to and since this instant action (all of which have either been settled prior to judgment or not appealed),[231] this instant action

[231]There has been a plethora of law review articles on the subject of the constitutionality of state corporate takeover laws and their relationship to federal law, as well as discussion of this dilemma in several texts on the subject of tender offers. Many of these are already cited and referred to herein; others will no doubt be cited and discussed by Appellee.

Several lawsuits were instituted prior to this instant action to challenge constitutionality of state takeover laws, but none resulted in definitive judgments. *See, e.g.* United Technologies Corp. v. Hafsten, No. IP 75-602-C (S.D. Ind. 1975); Ohio v. Imetal, No. 75 CV 09-3868 (C.P. Franklin Cty., Ohio, filed Oct. 9, 1975); Thrall Car Mfg. Co.; Youngstown Steel Door Co., Ohio Dep't of Commerce, Div. of Securities, File No. 041-10 (Aug. 2, 1976). Since this instant action, there has been even more litigation of the constitutional issues, but due to the volatile nature of takeover bids and usual appearance of a competitor or final resolution of the underlying dispute none have reached a level where the possibility or desirability of appeal or petition to this Court occurred. *See, e.g.* Occidental Petroleum Corp. v. Hurd, No. C-3-78-100 (S.D. Ohio 1978); Dart Indus., Inc. v. Conrad, No. P 78-709-C (S.D. Ind. 1978); Flynn v. Bass Brothers. Enterprises, Inc., 456 F.Supp. 484 (E.D. Pa. 1978); Roussell v. Boren, No. CIV 78-2345 (E.D. La. 1978) (challenges state ins. co. holding act on *Kidwell* grounds); S-G Securities, Inc. v. The Fuqua Investment Co., No. CIV 78-2392-S (D. Mass. 1978) (creeping tender offer). Yet other cases involve situations where takeover bidders have complied with state law but reserved the right to challenge its constitutionality in the future. *See, e.g.* Daylin v. Fratkin, No. CIV 79-161 (E.D. Pa. 1979). And it is now common practice to insert "boilerplate" language either in the tender offer or the 14D disclosure statement filed with the SEC explicitly reserving the right to challenge the constitutionality of any allegedly applicable state takeover laws. *See, e.g.* Offer for Daylin by W.R. Grace Co., Jan. 26, 1979; Offer for Comten by NCR Systems, Inc., Jan 22, 1979 (both with reservations in the offer); and Schedule 14D-1 in Offer for Washington Steel Co. by TW Corp., a subsidiary of Talley Indus., Inc., Feb. 1979.

stands alone as the sole case in the ten years since passage of the Williams Act that has reached a full decision on the merits at the appellate level—and because of the volatility of takeover bids it is likely to remain the only case in which these constitutional issues are framed so that this Court may resolve the dilemma which so seriously affects the commercial context of cash tender offers for corporate control.[232]

Respectfully submitted,

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GENERAL OF IDAHO
Counsel for Appellants.

February 22, 1979.

(Appendix Follows)

[232]In a letter dated April 19, 1976 (commenting on Senate Bill 2522 designed to amend the Securities Exchange Act to provide disclosure about persons intending to make a tender offer), then SEC Chairman Roderick M. Hills said to Senator Proxmire:

> Significantly, the propriety of such state [takeover] legislation is extremely difficult to challenge in court because of the time within which a tender offer must, as a practical matter, be completed. Judicial resolution of this question in a particular case would require a substantial period of time of obtain.

Reported in Subcomm. on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Comm., *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 192 (1976). And, as noted by leading text authors:

> [I]t is unlikely that the constitutionality of these [state] statutes will be readily and definitively resolved by the courts in the near future. Because tender offers, by their nature, must proceed rapidly in order to be successful, few, if any, tender offerors are willing or able to engage in the protracted legal proceedings necessary to have a state tender offer statute declared unconstitutional. Even if tender offerors choose or are obligated to raise the issue of the unconstitutionality of state tender offer statutes, the need for speedy resolution of tender offers is likely to create pressure that can only lead to settlement of those disputes prior to the issuance of a definitive judicial decision.

E. ARANOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL 233 (1977).

APPENDIX

15 U.S.C. § 78m(d, e) (1970)

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds

is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as

necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisition by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) (1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78*l* of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the numbers of shares to be purchased, the price to be paid for such se-

curities, the method of purchase, and such addition information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the isuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

15 U.S.C. § 78n(d-f) (1970)

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Com-

pany Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be

pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Idaho Code §§ 30-1501 to 30-1513

CHAPTER 15

Corporate Take-Overs

30-1501: Definitions.—When used in this chapter, unless the context otherwise requires:

(1) "Director" means the director of the department of finance.

(2) "Equity security" means any shares of stock or similar securities, or any securities convertible into such securities, or carrying any warrant or right to subscribe to or purchase such securities, or any such warrant or right, or any other security which, for the protection of investors, is deemed an equity security pursuant to rule of the director.

(3) "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates and associates of that person, and all persons acting jointly or in concert for the purpose of acquiring, holding or disposing of or exercising any voting rights attached to the equity securities for which a take-over offer is made. "Offeror" does not include any bank or broker-dealer loaning funds to an offeror in the ordinary course of its business, or any bank, broker-dealer, attorney, accountant, consultant, employee, or other person furnishing information or advice to or performing ministerial duties for an offeror, and not otherwise participating in the take-over offer.

(4) "Offeree" means the beneficial owner of equity securities which an offeror acquires or offers to acquire in connection with a take-over offer.

(5) "Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror would be directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer. "Take-over offer" does not include an offer or acquisition of any equity security of a target company pursuant to:

(a) Brokers' transactions effected by or through a broker-dealer in the ordinary course of its business.

(b) An exchange offer for securities of another issuer, if the offer is exempted from registration or is registered under chapter 14, title 30, Idaho Code, and does not involve any public offering under the Securities Act of 1933.

(c) An offer made to not more than ten (10) persons in this state during any period of twelve (12) consecutive months.

(a) An offer made to all the stockholders of the target company, if the number of its stockholders does not exceed one hundred (100) at the time of the offer.

(e) An offer as to which the target company, acting through its board of directors, recommends acceptance to its stockholders, if the offer is made to all stockholders on substantially equal terms.

(f) An offer if the acquisition of any equity security pursuant thereto, together with all other

acquisitions by the offeror of securities of the same class during the preceding twelve (12) months, would not exceed two per cent (2%) of that class of the outstanding equity securities of the issuer.

(g) An offer by the target company to acquire its own equity securities.

(6) "Target company" means a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in this state, which has substantial assets located in this state, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a take-over offer relating to any class of its equity securities. [I.C., § 30-1501, as added by 1975, ch. 248, § 1, p. 662.]

30-1502. Filing of ownership information.—(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a target company, is directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer shall, within ten (10) days after such acquisition, file with the director on a form prescribed by him a statement containing the following information and such additional information as the director by rule prescribes:

(a) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected.

(b) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of the parties thereto.

(c) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which such person has, upon gaining control, to liquidate the target company, sell its assets, effect its merger or consolidation or make any other major change in its business, corporate structure, management or personnel.

(d) The number of shares or units of any equity security of the target company of which each such person and each associate of such person and each person included as an offeror is the beneficial owner or which each such person has a right to acquire, directly or indirectly, together with the name and address of each such person.

(e) Material information as to any contracts, arrangements or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guaranties or profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with

whom such contracts, arrangements or understandings have been entered into.

(2) If the target company is an issuer the acquisition of whose equity securities is subject to the requirements of section 13(d) of the Securities Exchange Act of 1934, any person may file with the director a signed copy of the statement prescribed therein in lieu of the statement prescribed in section 30-1502(1), Idaho Code.

(3) Any person may file with the director, in lieu of the statement prescribed in section 30-1502(1), Idaho Code, and unless otherwise ordered by the director, a statement containing his name and address, the number of shares or units of any equity security of the target company which are beneficially owned directly or indirectly by him and each of his associates, the date of their acquisition and such other information as the director may by rule prescribe, if he certifies that such securities were acquired by him, in the ordinary course of his business and not for the purpose or having the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect, and that he does not intend to make a take-over offer involving the target company.

(4) If any material change occurs in the facts set forth in the statement, the person filing the statement shall, within ten (10) days thereafter, file with the director an amendment describing the change, in accordance with such rules as the director prescribes.

(5) Each person required to file any statement or amendment thereto with the director under this section

shall send a signed copy of such statement or amendment by certified mail to the target company at its principal office not later than the date of filing.

(6) No person required to file any ownership statement under this section, who is delinquent in the filing of such statement, may file a registration statement relating to a proposed take-over for a period of sixty (60) days after the date of filing of the ownership statement, except as may be permitted by order of the director. [I.C., § 30-1502, as added by 1975, ch. 248, § 1, p. 662.]

30-1503. Registration of take-over offers.—(1) It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director. Before a take-over offer becomes effective under this chapter, the offeror shall file with the director a registration statement containing the information prescribed in section 30-1503(2), Idaho Code, and send a copy of the registration statement by certified mail to the target company at its principal office and publicly disclose the material terms of the proposed offer, not later than the date of filing of the registration statement.

(2) The registration statement shall be filed on forms prescribed by the director, and shall be accompanied by a consent by the offeror to service of process specified in section 30-1436, Idaho Code, and the filing fee specified in section 30-1508, Idaho Code, and shall contain the following information and such additional information as the director by rule prescribes:

(a) All of the information specified in section 30-1502(1), Idaho Code, any part of which may be incorporated by reference to the extent that it was previously filed.

(b) Three (3) copies of the proposed take-over offer, including all material terms thereof, in the form proposed to be published or sent or delivered to security holders of the target company.

(c) Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, a description of each class of its capital stock and long-term debt, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period.

(d) Material information concerning the identity and background of any offeror who is not a corporation, including his material business activities and affiliations during the past three (3) years, and a description of any material pending legal or administrative proceedings in which the offeror is a party.

(3) The director may require the offeror to file any other documents, exhibits and information that he deems material to the take-over offer, and he may permit the omission of any of the information specified in section 30-1503(2), Idaho Code, if he determines that such information is not required for the protection of offerees. The director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), Idaho Code, or does not provide full disclosure to offerees of all material information concerning the offer.

(4) A take-over offer becomes effective when approved by the director. The director may call a hearing if he deems it necessary or appropriate for the protection of offerees in this state, and shall call a hearing if so requested by the target company, acting through its board of directors. If a hearing is called, the offer shall not become effective until registered by order of the director.

(5) Any hearing called by the director under this section shall be held within twenty (20) days of the date of filing of the registration statement under section 30-1503(1), Idaho Code, and any determination made following the hearing shall be made within thirty (30) days after such filing, unless extended by order of the director for the convenience of the parties or for the protection of offerees in this state. If, the following the hearing, the director finds that the take-over offer fails to provide for full disclosure to offerees of all material information concerning the offer, or will not be made to all stockholders on substantially equal terms or is in violation of chapter 14, title 30, Idaho

Code, he shall by order deny registration of the offer. Registration of the offer is not deemed approval of the offer by the director. [I.C., § 30-1503, as added by 1975, ch. 248, § 1, p. 662.]

30-1504. Filing of solicitation materials.—(1) Copies of all advertisements, circulars, letters or other materials published by the offeror or the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the director and sent to the target company or offeror, respectively, not later than the time copies of such solicitation materials are first published or used or sent to security holders of the target company.

(2) Solicitation materials used in connection with a take-over offer shall not contain any false statement of a material fact or omit to state a material fact necessary to make the statement therein not misleading. The director may by rule or order prohibit the use of any solicitation materials deemed false or misleading. [I.C., § 30-1504, as added by 1975, ch. 248, § 1, p. 662.]

30-1505. Fraudulent and deceptive practices.—It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation:

(1) Publication or use in connection with the offer of any false statement of a material fact or omitting to state a material fact necessary to make the statements made by him not misleading, but not including the mailing by a target company to its stockholders of solicitation materials published by an offeror.

(2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer.

(3) Refusal by a target company to permit an offeror who is a stockholder of record to examine its list of stockholders, and to make extracts therefrom, pursuant to the applicable corporation statute, for the purpose of making a take-over offer in compliance with this chapter.

(4) Acquisition by or through a broker-dealer acting on behalf of an offeror of any equity security of the target company in connection with a take-over offer unless the broker-dealer files with the director such information as he requires and to the extent permitted by rule or order by the director, or unless the broker-dealer did not know and in the exercise of reasonable care could not have known that the person for whom it acted was an offeror or that the acquisition was in connection with a take-over offer. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1506. Limitations on offerors.—(1) No offeror may make a take-over offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders in this state on substantially the same terms as the offer is made to stockholders outside this state.

(2) An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a take-over offer may be withdrawn by or on behalf of any offeree at any time within seven (7) days from the date the offer has become effective under this chapter and after sixty (60) days from the date the offer has become effective under this chapter, except as the director may otherwise prescribe by rule or order for the protection of investors.

(3) If an offeror makes a take-over offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto within ten (10) days after the offer has become effective under this chapter and copies of the offer, or notice of any increase in the consideration offered, are first published or sent or given to security holders is greater than the number the offeror has offered to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

(4) If an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to security holders, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer.

(5) No offeror may make a take-over offer involving a target company, or acquire any equity securities of a target company pursuant to the offer, at any time when an administrative or injunctive proceeding has been brought by the director against the offeror for violation of this chapter that has not been finally determined.

(6) No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company located in this state in connection with a take-over offer unless the take-over offer is effective or exempt under this chapter, except as permitted by order of the director. [I.C., § 30-1506, as added by 1975, ch. 248, § 1, p. 662.]

30-1507. Administration, rules and orders.—(1) This chapter shall be administered by the director of the department of finance, who may exercise all powers granted to him under chapter 14, title 30, Idaho Code, which are not inconsistent with this chapter.

(2) The director may make rules necessary to carry out the purposes of this chapter, including, without limitation, the definition of terms used in this chapter.

(3) The director may by rule or order exempt from any provisions of this chapter take-over offers that he determines are not made for the purpose or do not have the effect of changing or influencing the control of a target company or where compliance with this chapter is not necessary for the protection of the stockholders of the target company, and he may similarly exempt any persons from the filing of statements under this chapter.

(4) The director may by order direct any person to file any statement provided for in this chapter if it appears that such person is required to file such statement and is delinquent in the filing of such statement. [I.C., § 30-1507, as added by 1975, ch. 248, § 1, p. 662.]

30-1508. Fees and expenses.—(1) For each registration statement filed by an offeror, the offeror shall pay a filing fee based upon the cost to the department of finance to

examine and evaluate the registration statement in accordance with the schedules adopted by the director. The schedules adopted by the director shall be designed to assure that the fees collected shall be sufficient to cover the cost of administering this act.

(2) All of the expenses reasonably attributable to any hearing held under this chapter shall be charged ratably to the offeror and the target company but the total amount charged shall not exceed one thousand five hundred dollars ($1,500). [I.C., § 30-1508, as added by 1975, ch. 248, § 1, p. 662.]

30-1509. Injunctions.—Whenever it appears to the director that any person, including a controlling person of an offeror or target company, has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder, he may bring an action in the name of the state in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder, or he may refer the matter to the attorney general or the proper prosecuting attorney. Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order or may order rescission of any sales or purchases of securities determined to be unlawful under this chapter or any rule or order hereunder. The court may not require the director to post a bond. [I.C., § 30-1509, as added by 1975, ch. 248, § 1, p. 662.]

30-1510. Criminal penalties.—(1) Any person, including a controlling person of an offeror or target company, who wilfully violates this chapter or any rule under this chapter, or any order of which he has notice, may be fined not

more than five thousand dollars ($5,000) or imprisoned not more than three (3) years or both. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this chapter more than three (3) years after the alleged violation.

(2) The director may refer such evidence as is available concerning violations of this chapter or of any rule or order hereunder to the attorney general or the proper prosecuting attorney who may, with or without reference, institute the appropriate criminal proceedings under this chapter. If referred to a prosecuting attorney, he shall within ninety (90) days file with the director a statement concerning any action taken or, if no action has been taken, the reasons therefor.

(3) Nothing in this chapter limits the power of the state to punish any person for any conduct which constitutes a crime under any other statute. [I.C., § 30-1510, as added by 1975, ch. 248, §1, p. 662.]

30-1511. Civil liabilities.—(1) Any offeror who purchases a security in connection with a take-over offer not in compliance with this chapter or by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the

purchaser thereon, upon tender of the consideration received, or for damages. Damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable.

(2) Every person who directly or indirectly controls a person liable under section 30-1511(1), Idaho Code, every partner, principal executive officer or director of such person, every person occupying a similar status or performing similar functions, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, is also liable jointly or severally with and to the same extent as such person, unless the person liable hereunder proves that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(3) No action may be maintained under this section unless commenced before the expiration of three (3) years after the act or transaction constituting the violation.

(4) The rights and remedies under this chapter are in addition to any other rights or remedies that may exist at law or in equity. [I.C., § 30-1511, as added by 1975, ch. 248, § 1, p. 662.]

30-1512. Application of chapter.—(1) If the target company is an insurance company subject to regulation by the director of the department of insurance, a banking corporation subject to regulation by the director of the department of finance, a savings and loan association subject to regulation by the director of the department of finance, or a public utility subject to regulation by the public utilities commission, the director shall promptly furnish a copy of the registration statement filed under this chapter to the regulatory agency having supervision of the target company. Any hearing under this chapter involving any such target company shall be held jointly with the regulatory agency having supervision, and any determination following the hearing shall be made jointly with that regulatory agency.

(2) If the target company is a public utility, public utility holding company, national banking association, bank holding company or savings and loan association subject to regulation by a federal agency and the take-over of such company is subject to approval by that agency, this chapter shall not apply.

(3) This chapter shall not apply to any offer involving a class vote by stockholders of the target company, pursuant to its articles of incorporation or the applicable corporation statute, on a merger, consolidation or sale of corporate assets in consideration of the issuance of securities of another corporation, or sale of its securities in exchange for cash or securities of another corporation. [I.C., § 30-1512, as added by 1975, ch. 248, § 1, p. 662.]

30-1513. Application of securities law.—All of the provisions of chapter 14, title 30, Idaho Code, which are not in conflict with this chapter shall apply to any take-over offer involving a target company. [I.C., § 30-1513, as added by 1975, ch. 248, § 1, p. 662.]